SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 5, 2021

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

755/19

KA 17-01097

PRESENT: SMITH, J.P., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TREVIS D. BAKER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

TREVIS D. BAKER, DEFENDANT-APPELLANT PRO SE.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered May 15, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree. The judgment was affirmed by order of this Court entered August 22, 2019 in a memorandum decision (175 AD3d 1113), and defendant on January 21, 2020 was granted leave to appeal to the Court of Appeals from the order of this Court (34 NY3d 1126), and the Court of Appeals on December 15, 2020 reversed the order and remitted the case to this Court for consideration of issues raised but not decided on the appeal to this Court (— NY3d — [Dec. 15, 2020]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Bisono*, — NY3d —, 2020 NY Slip Op 07484 [2020], *revg People v Baker*, 175 AD3d 1113 [4th Dept 2019]). We previously affirmed a judgment convicting defendant upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]). We concluded that defendant validly waived his right to appeal, and that such waiver encompassed his challenge in his main brief to the severity of the sentence and his challenge in his pro se supplemental brief to the geographic jurisdiction of County Court, and encompassed in part his contention in his pro se supplemental brief that he was denied effective assistance of counsel (*Baker*, 175 AD3d at 1114-1115). We further concluded that, to the extent that his contention that he was deprived of effective assistance of counsel was reviewable on direct

appeal, it lacked merit (*id.* at 1115). The Court of Appeals reversed, stating that, based on the plea colloquy, it could not say that "defendant[] comprehended the nature and consequences of the waiver of appellate rights" (*Bisono*, — NY3d at —, 2020 NY Slip Op 07484, *2 [internal quotation marks and brackets omitted]). The Court of Appeals remitted the matter to this Court for consideration of the issues raised but not decided on the appeal to this Court.

Upon remittitur, we affirm. The sentence is not unduly harsh or severe. Furthermore, notwithstanding the invalidity of defendant's waiver of the right to appeal, his challenge to the geographic jurisdiction of County Court is actually a challenge to venue (*see People v Curtis*, 286 AD2d 901, 901-902 [4th Dept 2001], *lv denied* 97 NY2d 728 [2002]; *see generally People v Greenberg*, 89 NY2d 553, 555-556 [1997]), which defendant forfeited by pleading guilty (*see People v Harris*, 182 AD3d 992, 995 [4th Dept 2020], *lv denied* 35 NY3d 1066 [2020]; *People v Gesualdi*, 247 AD2d 629, 629 [2d Dept 1998], *lv denied* 92 NY2d 852 [1998]; *see generally People v Williams*, 14 NY2d 568, 570 [1964]).

Insofar as defendant's contention that he was denied effective assistance of counsel is before us on remittitur, that contention "does not survive his plea of guilty inasmuch as [t]here is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance" (*People v Goforth*, 122 AD3d 1310, 1310 [4th Dept 2014], *lv denied* 25 NY3d 951 [2015] [internal quotation marks omitted]; *see People v Cooper*, 136 AD3d 1397, 1398 [4th Dept 2016], *lv denied* 27 NY3d 1067 [2016]). Defendant's remaining contentions in his pro se supplemental brief alleging ineffective assistance of counsel are not before us on remittitur inasmuch as they were "decided on the appeal to" this Court in our prior decision (*Bisono*, — NY3d at —, 2020 NY Slip Op 07484, *3).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

843/19

KA 17-01753

PRESENT: WHALEN, P.J., SMITH, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY R. MAGEE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered July 10, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree. The judgment was affirmed by order of this Court entered September 27, 2019 in a memorandum decision (175 AD3d 1824), and defendant on January 24, 2020 was granted leave to appeal to the Court of Appeals from the order of this Court (34 NY3d 1130), and the Court of Appeals on December 15, 2020 reversed the order and remitted the case to this Court for consideration of issues raised but not decided on the appeal to this Court (— NY3d — [Dec. 15, 2020]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Bisono*, — NY3d —, 2020 NY Slip Op 07484 [2020], *revg People v Magee*, 175 AD3d 1824 [4th Dept 2019]). We previously affirmed the judgment convicting defendant upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), concluding that defendant's waiver of the right to appeal was knowing, voluntary and intelligent and that the waiver encompassed his challenge to the severity of the sentence (*Magee*, 175 AD3d at 1824-1825). The Court of Appeals reversed, stating that, under the totality of the circumstances, the waiver of the right to appeal was invalid because "the rights encompassed by [the] appeal waiver were mischaracterized during the oral colloquy and in [the]written form[] executed by defendant, which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and . . .

advised that the waiver encompassed 'collateral relief on certain nonwaivable issues in both state and federal courts' " (*Bisono*, — NY3d at —, 2020 NY Slip Op 07484, *2). The Court of Appeals remitted the matter to this Court "for consideration of issues raised but not decided" previously (*id.* at —, 2020 NY Slip Op 07484, *2-3).

After review of defendant's contention upon remittitur, we conclude that the sentence is not unduly harsh or severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1051/19

CA 19-00473

PRESENT: CENTRA, J.P., CARNI, CURRAN, TROUTMAN, AND WINSLOW, JJ.

CHRISTINE KLOCK, AS ADMINISTRATRIX OF THE ESTATE
OF WILLIAM MCINTOSH, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

ALBANY INTERNATIONAL CORP., ET AL., DEFENDANTS,
AND VANDERBILT MINERALS, LLC, DEFENDANT-RESPONDENT.

LIPSITZ & PONTERIO, LLC, BUFFALO (GRACE M. GANNON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GORDON REES SCULLY & MANSUHKANI, LLP, NEW YORK CITY (ERIK DIMARCO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James W. McCarthy, J.), entered August 30, 2018. The order granted the motion of defendant Vanderbilt Minerals, LLC, for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 16, 2020,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1084/19

KA 17-01302

PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA L. MILLER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAIXI XU OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered October 17, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the second degree. The judgment was affirmed by order of this Court entered November 15, 2019 in a memorandum decision (177 AD3d 1397), and defendant on February 20, 2020 was granted leave to appeal to the Court of Appeals from the order of this Court (34 NY3d 1161), and the Court of Appeals on December 15, 2020 reversed the order and remitted the case to this Court for consideration of issues raised but not decided on the appeal to this Court (— NY3d — [Dec. 15, 2020]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Bisono*, — NY3d —, 2020 NY Slip Op 07484 [2020], *revg People v Miller*, 177 AD3d 1397 [4th Dept 2019]). We previously affirmed the judgment convicting defendant upon his plea of guilty of attempted criminal possession of a controlled substance in the second degree (Penal Law §§ 110.00, 220.18 [2]) and concluded that defendant's waiver of the right to appeal was valid and that it encompassed his challenge to the severity of the sentence as well as his challenge to County Court's suppression ruling (*Miller*, 177 AD3d at 1397). The Court of Appeals reversed, determining that, pursuant to the analysis in *People v Thomas* (34 NY3d 545 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), defendant's waiver of the right to appeal was "invalid and unenforceable" (*Bisono*, — NY3d at —, 2020 NY Slip Op 07484, *2). The Court of Appeals remitted the matter to this Court for consideration of issues raised but not determined previously (*id.*

at —, 2020 NY Slip Op 07484, *2-3). We now affirm.

Contrary to defendant's contention, the court did not err in refusing to suppress evidence recovered during the execution of a search warrant. The information in the search warrant application "was indicative of an ongoing drug operation at [the searched location], and thus the application established probable cause to believe that a search of [that location] would result in evidence of drug activity" (*People v Santos*, 122 AD3d 1394, 1395 [4th Dept 2014] [internal quotation marks omitted]; *see People v Coleman*, 176 AD3d 851, 852 [2d Dept 2019], *lv denied* 34 NY3d 1076 [2019]).

We reject defendant's further contention that the court failed to comply with CPL 710.60 (6), which requires it to "set forth on the record its findings of facts, its conclusions of law and the reason for its determination" with respect to suppression. Although the court's statement was terse, we conclude that it was in substantial compliance with the statutory requirement (*see People v Franco*, 167 AD2d 957, 957 [4th Dept 1990]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1280/19

KA 18-01034

PRESENT: CENTRA, J.P., CARNI, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA D. BIASELLI, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Sara Sheldon, A.J.), rendered February 26, 2018. The judgment convicted defendant upon a plea of guilty of driving while intoxicated, as a class E felony. The judgment was affirmed by order of this Court entered January 31, 2020 in a memorandum decision (179 AD3d 1533), and defendant on April 9, 2020 was granted leave to appeal to the Court of Appeals from the order of this Court (35 NY3d 968), and the Court of Appeals on December 15, 2020 reversed the order and remitted the case to this Court for consideration of issues raised but not decided on the appeal to this Court (— NY3d — [Dec. 15, 2020]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Bisono*, — NY3d —, 2020 NY Slip Op 07484 [2020], *revg People v Biaselli*, 179 AD3d 1533 [4th Dept 2020]). We previously affirmed the judgment convicting defendant upon his plea of guilty of driving while intoxicated, as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), concluding that defendant's waiver of the right to appeal was knowingly, voluntarily, and intelligently entered and that the waiver encompassed his challenge to the severity of the sentence (*Biaselli*, 179 AD3d at 1533-1534). We further concluded that defendant's contention that County Court did not adhere to its promise not to impose the maximum sentence survived the waiver but was unpreserved and without merit in any event (*id.* at 1534). Lastly, we concluded that defendant's remaining contentions, to the extent they were not encompassed by the waiver of the right to appeal, were not preserved for our review (*id.*). The Court of Appeals reversed, stating that the waiver was invalid and

unenforceable pursuant to its analysis in *People v Thomas* (34 NY3d 545 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) (*see Bisono*, — NY3d at —, 2020 NY Slip Op 07484, *2). The Court of Appeals remitted the matter to this Court "for consideration of issues raised but not decided" due to the enforcement of defendant's waiver of the right to appeal (*id.* at —, 2020 NY Slip Op 07484, *2-3).

After review of defendant's contentions upon remittitur, we conclude that the sentence is not unduly harsh or severe. We further conclude that defendant's remaining contentions are not preserved for our review (*see* CPL 470.05 [2]; *see generally People v Howland*, 130 AD3d 1105, 1106 [3d Dept 2015], *lv denied* 26 NY3d 1089 [2015]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

435

CA 19-01782

PRESENT: CENTRA, J.P., NEMOYER, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

JACQUELINE MARIE THOMPSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WALTER HALL, M.D., DEFENDANT-RESPONDENT.

COTE & VANDYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GALE GALE & HUNT, LLC, SYRACUSE (CATHERINE A. GALE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered April 2, 2019. The order granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint, as amplified by the first amended bill of particulars, insofar as it asserts claims for medical malpractice with respect to negligence in the performance of both surgeries and treatment of postoperative complications, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries she allegedly sustained as a result of cervical fusion surgery performed by defendant. In 2013, plaintiff was involved in a motor vehicle accident and developed neck pain. Thereafter, defendant performed an anterior cervical fusion (first surgery). Plaintiff had no surgical complications after the first surgery and her neck pain seemed to be improving until February 2014, when she was involved in a second motor vehicle accident. After the second accident, plaintiff experienced increased neck pain, and defendant performed a posterior cervical fusion (second surgery). Plaintiff developed postoperative fluid accumulation around her cervical spine and was subsequently diagnosed with myelomalacia. Plaintiff now appeals from an order granting defendant's motion for summary judgment dismissing the complaint.

Initially, with respect to plaintiff's contention concerning her claim of breach of contract, that theory of liability was not raised in the complaint and "[a] bill of particulars may not be used to allege a new theory not originally asserted in the complaint"

(*Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011] [internal quotation marks omitted]; *see Linker v County of Westchester*, 214 AD2d 652, 652 [2d Dept 1995]).

Plaintiff further contends that Supreme Court erred in granting defendant's motion with respect to her claim that defendant failed to obtain her informed consent to perform the second surgery. We reject that contention. "To succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment" (*Orphan v Pilnik*, 15 NY3d 907, 908 [2010]; *see Gray v Williams*, 108 AD3d 1085, 1086 [4th Dept 2013]).

Here, defendant met his initial burden of establishing his entitlement to judgment as a matter of law with respect to the claim of lack of informed consent by submitting deposition testimony and medical records demonstrating that he informed plaintiff of the reasonably foreseeable risks associated with the second surgery, confirmed that she understood those risks, and obtained her written consent (*see Gray*, 108 AD3d at 1086; *see generally Tirado v Koritz*, 156 AD3d 1342, 1344 [4th Dept 2017]). Contrary to plaintiff's contention, defendant did not raise an issue of fact himself by submitting plaintiff's deposition testimony, wherein she testified that defendant failed to advise her of his qualifications and explain that he had not previously performed the type of surgery that was recommended. A claim of lack of informed consent "is limited to the failure of the person providing professional treatment or diagnosis to disclose to the patient . . . alternatives to treatment, and [reasonably foreseeable] risks and benefits involved in treatment; it cannot reasonably be read to require disclosure of qualifications of personnel providing that treatment" (*Abram v Children's Hosp. of Buffalo*, 151 AD2d 972, 972 [4th Dept 1989], *lv dismissed* 75 NY2d 865 [1990]).

Furthermore, plaintiff failed to raise an issue of fact in opposition with respect to that claim. Plaintiff's opposing papers consisted only of letters of attestation and the affirmation of her expert neurosurgeon. Plaintiff's expert did not provide an opinion on the issue of informed consent, and the attestation letters were unsworn and thus not in admissible form (*see Feggins v Fagard*, 52 AD3d 1221, 1223 [4th Dept 2008]; *Green v Gloede*, 222 AD2d 1066, 1067 [4th Dept 1995]; *Barrette v General Elec. Co.*, 144 AD2d 983, 983 [4th Dept 1988]).

We agree with plaintiff, however, that the court erred in granting the motion insofar as it sought summary judgment dismissing her claims for medical malpractice with respect to negligence in the performance of the two surgeries and treatment of the postoperative complications, and we therefore modify the order accordingly. With respect to the claim for medical malpractice relating to defendant's

performance of the first surgery, the complaint, as amplified by the first amended bill of particulars, alleges that defendant's overall care and treatment of plaintiff deviated from the standard of care and proximately caused her injuries. Defendant satisfied his initial burden with respect to deviation and causation (*see generally Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]) by submitting, among other things, the affirmation of his expert neurosurgeon, who opined that defendant did not deviate from good and accepted medical practice regarding conservative treatment, and that defendant's care and treatment of plaintiff did not proximately cause her any injury (*see generally id.*; *Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]). Thus, the burden shifted to plaintiff to raise a triable issue of fact in opposition to the motion (*see generally Occhino*, 151 AD3d at 1871). Plaintiff submitted the affirmation of her expert neurosurgeon, who opined, inter alia, that defendant deviated from the standard of care in recommending the first surgery, which was unnecessary, and that plaintiff suffered injury as a result of defendant's negligence in performing that surgery. Indeed, plaintiff's expert opined that conservative care had not been sufficiently followed, that plaintiff's level of pain and disability did not justify the risk of the first surgery, and that there were insufficient pathological findings to conclude that the benefits of surgery outweighed the risks. Thus, the conflicting opinions of the parties' experts with respect to defendant's alleged deviations from the accepted standard of medical care and proximate causation " 'present credibility issues that cannot be resolved on a motion for summary judgment' " (*Fay v Satterly*, 158 AD3d 1220, 1221 [4th Dept 2018]; *see Moyer v Roy*, 152 AD3d 1188, 1190 [4th Dept 2017]; *see generally Lamb v Stephen M. Baker, O.D., P.C.*, 152 AD3d 1230, 1230 [4th Dept 2017]).

Defendant also met his initial burden on the motion with respect to the medical malpractice claim relating to his alleged negligence in performing the second surgery. Defendant established through the submission of deposition testimony, plaintiff's medical records, and the affirmation of his expert neurosurgeon that, by attempting conservative treatment and making a recommendation of surgery based on the MRI findings and plaintiff's persistent complaints after the second accident, he did not deviate from the applicable standard of care in performing that surgery and did not cause injury to plaintiff (*see generally Bubar*, 177 AD3d at 1359).

In opposition, however, plaintiff raised triable issues of fact in that respect by submitting the affirmation of her expert neurosurgeon, who opined, inter alia, that the second surgery was unnecessary and that defendant deviated from the standard of care in recommending that surgery because plaintiff had reported significant relief of her symptoms. We conclude that the conflicting expert opinions present issues of fact whether the second surgery was unnecessary and whether the performance of that surgery "caused an injury" (*Moyer*, 152 AD3d at 1190 [4th Dept 2017]; *see Hatch v St. Joseph's Hosp. Health Ctr.*, 174 AD3d 1404, 1406 [4th Dept 2019]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]).

With respect to plaintiff's claim concerning defendant's alleged malpractice in negligently failing to provide adequate treatment for the postoperative accumulation of fluid around her spine, we conclude that defendant failed to meet his initial burden on the motion. The affirmation of defendant's expert was merely conclusory with respect to whether the fluid accumulation issue resolved prior to plaintiff's discharge (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 545 [2002]; *Occhino*, 151 AD3d at 1871; *Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755 [3d Dept 2001]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

517

CA 19-01065

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

JOSEPH VENDETTI, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STEPHEN ZYWIAK, MICHAEL SHAMMA, BRIAN HOFFMAN,
KATHLEEN FREDERICK,
DEFENDANTS-APPELLANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

BOSMAN LAW, LLC, BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 10, 2018. The judgment awarded plaintiff money damages upon a jury verdict and awarded plaintiff attorneys' fees.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion for a directed verdict is granted, the award of attorneys' fees is vacated, and the second amended complaint is dismissed.

Memorandum: Plaintiff, a civil engineer employed by the New York State Department of Transportation (DOT), commenced this action against defendants-appellants—who are three DOT supervisors and a human resources administrator—among others, after plaintiff was demoted from a supervisory position following a disciplinary investigation. In his second amended complaint, plaintiff alleged that he was demoted in retaliation for, inter alia, filing a whistleblower complaint alleging misconduct by another DOT employee and asserted various causes of action, including for prima facie tort, tortious interference with a contract, and retaliation in violation of the First Amendment pursuant to 42 USC § 1983 (collectively, subject causes of action). Defendants thereafter moved, inter alia, to dismiss the second amended complaint. Supreme Court denied the motion insofar as it sought to dismiss the subject causes of action against defendants-appellants, and granted the motion insofar as it sought to dismiss the second amended complaint against the only four remaining defendants (dismissed defendants).

During trial, defendants-appellants (hereafter, defendants) moved for a directed verdict pursuant to CPLR 4401, arguing, inter alia, that plaintiff did not meet his prima facie burden with respect to the subject causes of action. The court denied defendants' motion. Following trial, the jury returned a verdict finding defendants liable on all of the subject causes of action, except for defendant Brian Hoffman, who was found liable on all but the retaliation cause of action, and awarded plaintiff damages. Plaintiff thereafter moved for an award of attorneys' fees pursuant to 42 USC § 1988, which the court granted against defendants Stephen Zywiak, Michael Shamma, and Kathleen Frederick (collectively, retaliation defendants). Defendants now appeal from the final judgment awarding plaintiff damages and attorneys' fees, and plaintiff cross-appeals from that judgment to the extent that it brings up for review the order granting in part the motion seeking, inter alia, dismissal of the second amended complaint (*see generally* CPLR 5501 [a] [1]).

We agree with defendants on their appeal that the court erred in denying their motion for a directed verdict because, "upon the evidence presented, there was no rational process by which the trier of fact could find in plaintiff's favor" (*Shmueli v Whitestar Dev. Corp.*, 148 AD3d 1814, 1814 [4th Dept 2017]; *see generally Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Here, the evidence at trial established that, in November 2007, the DOT promoted plaintiff to a supervisory position that had a one-year probationary period. According to plaintiff's testimony, before he was promoted he made an anonymous whistleblower complaint reporting a fellow employee's misconduct. During the course of an unrelated investigation, a DOT investigator discovered evidence that plaintiff had violated the DOT's computer use policy and that plaintiff was the person who had filed the whistleblower complaint. Thereafter, the investigator requested that an interrogation of plaintiff be conducted in furtherance of a disciplinary investigation into plaintiff's computer use pursuant to the terms of the collective bargaining agreement between plaintiff's union and the DOT (CBA). During the interrogation, plaintiff admitted using DOT computers for personal reasons, including for sending sexually explicit emails to Hoffman, to whom plaintiff reported, and for storing sexually explicit images.

As a result of the disciplinary investigation, the DOT served plaintiff with a notice of discipline (NOD) asserting several misconduct charges against him and recommending termination of his employment. Although the NOD was signed by Frederick, who worked in the DOT's regional human resources office, approval was required by the DOT's director of employee relations because the NOD recommended termination. Shortly thereafter, plaintiff received his final probationary performance evaluation, which rated his job performance as unsatisfactory and recommended that his probationary status in his supervisory position be terminated because the investigation revealed "on-the-job misconduct." His performance evaluation was signed by Hoffman and Zywiak, to whom Hoffman reported; plaintiff declined to sign the evaluation, a fact that Frederick noted. Based on that performance evaluation, plaintiff was demoted to his prior non-supervisory title with the DOT. Eventually, the DOT withdrew the NOD

insofar as it sought to terminate plaintiff's employment.

Initially, based on the evidence adduced at trial, we conclude that defendants were entitled to a directed verdict with respect to the tortious interference with a contract cause of action. A claim for tortious interference with a contract requires "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

As a general rule, " '[o]nly a stranger to a contract, such as a third party, can be liable for tortious interference with a contract' " (*Widewaters Prop. Dev. Co., Inc. v Katz*, 38 AD3d 1220, 1222 [4th Dept 2007]). As relevant here, a government employee acting on behalf of his or her employer "and within the scope of his [or her] authority" cannot be held liable for inducing a breach of contract involving the employer (*Tri-Delta Aggregates v Goodell*, 188 AD2d 1051, 1051 [4th Dept 1992], *lv denied* 82 NY2d 653 [1993]; *see Kartiganer Assoc. v Town of New Windsor*, 108 AD2d 898, 899 [2d Dept 1985], *appeal dismissed* 65 NY2d 925 [1985]). As an exception to the general rule, an employee may be found liable where he or she "acted outside the scope of . . . employment and committed *independent torts* or predatory acts directed at" the plaintiff (*Marks v Smith*, 65 AD3d 911, 916 [1st Dept 2009], *lv denied* 15 NY3d 704 [2010] [emphasis added]; *see Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]; *Buckley v 112 Cent. Park S., Inc.*, 285 App Div 331, 334 [1st Dept 1954]).

Here, we agree with defendants that the evidence at trial established only that they acted on behalf of the DOT and within the scope of their authority when they took the adverse employment actions against plaintiff (*see generally Tri-Delta Aggregates*, 188 AD2d at 1051). There was no evidence from which the jury could have rationally concluded that there was "any independently tortious conduct on the part of . . . defendants" (*Murtha*, 45 NY2d at 915; *see generally Marks*, 65 AD3d at 916).

We further conclude that the court erred in denying defendants' motion for a directed verdict with respect to the prima facie tort cause of action. "The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985] [internal quotation marks omitted]; *see Greater Buffalo Acc. & Injury Chiropractic, P.C. v Geico Cas. Co.*, 175 AD3d 1100, 1101 [4th Dept 2019]). "There can be no recovery [for prima facie tort] unless a disinterested malevolence to injure [a] plaintiff constitutes the sole motivation for [the] defendant['s] otherwise lawful act" (*Backus v Planned Parenthood of Finger Lakes*, 161 AD2d 1116, 1117 [4th Dept 1990] [internal quotation marks omitted]; *see Medical Care of W. N.Y. v Allstate Ins. Co.*, 175 AD3d 878, 880 [4th Dept 2019]). Here,

"viewing the evidence presented in the light most favorable to [plaintiff]" (*DeAngelis v Protopopescu*, 37 AD3d 1178, 1178 [4th Dept 2007]), we conclude that there was no rational process by which the jury could find that defendants' *sole motivation* was to act with " 'disinterested malevolence' " toward plaintiff (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]; *see generally Greater Buffalo Acc. & Injury Chiropractic, P.C.*, 175 AD3d at 1101). Instead, the evidence established that defendants' challenged actions were completed while acting in their official capacity on behalf of the DOT. Indeed, the uncontroverted fact that plaintiff violated the DOT's computer use policy established a non-malevolent motivation for defendants' challenged actions toward plaintiff.

We further conclude that the court erred in denying defendants' motion for a directed verdict with respect to the cause of action pursuant to 42 USC § 1983 for retaliation predicated on violations of the First Amendment against the retaliation defendants. It is well established that "a defendant in a [section] 1983 action may not be held liable for damages for constitutional violations merely because he [or she] held a high position of authority" (*Black v Coughlin*, 76 F3d 72, 74 [2d Cir 1996]). Rather, the "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under [section] 1983" (*Farrell v Burke*, 449 F3d 470, 484 [2d Cir 2006] [internal quotation marks omitted]). As the United States Supreme Court has held, "each [g]overnment official, his or her title notwithstanding, is only liable for his or her own misconduct" (*Ashcroft v Iqbal*, 556 US 662, 677 [2009]). "Personal involvement" may be shown by " 'direct participation,' " which requires in this context "intentional participation in the conduct constituting a violation of the victim's rights by one who knew of the facts rendering it illegal" (*Provost v City of Newburgh*, 262 F3d 146, 155 [2d Cir 2001] [footnote omitted]).

Here, even affording plaintiff "every inference which may properly be drawn from the facts presented," and considering the facts "in a light most favorable to" plaintiff (*Doolittle v Nixon Peabody LLP*, 155 AD3d 1652, 1656 [4th Dept 2017] [internal quotation marks omitted]), we conclude that there was no rational process by which the jury could find that the retaliation defendants directly participated in the decision to terminate plaintiff's probation or that they knew sufficient facts concerning the alleged unlawfulness of that action. Indeed, there was no evidence that they *directly* participated in the adverse employment decisions or that they even had the authority to do so. Instead, the evidence demonstrated that the retaliation defendants carried out decisions made by others at the DOT.

With respect to plaintiff's cross appeal, we reject plaintiff's contention that the second amended complaint should be reinstated and judgment entered against the dismissed defendants based upon the evidence adduced at trial. The second amended complaint was dismissed against the dismissed defendants due to pleading deficiencies contained in that complaint. In short, the court concluded that plaintiff failed to state a cause of action against those defendants. At no time thereafter did plaintiff ever seek to amend the second

amended complaint to correct the identified deficiencies (*see generally* CPLR 3025). Moreover, on his cross appeal, plaintiff does not contend that the court erred in granting the motion insofar as it sought to dismiss the second amended complaint against the dismissed defendants. Thus, because there is currently no pending complaint against the dismissed defendants, and because those defendants were not given the opportunity to defend themselves at trial, there is no legal basis for this Court to enter judgment in favor of plaintiff against those defendants based on the evidence ultimately adduced at trial (*see generally* CPLR 3011; *Christiana Trust v Rice* [appeal No. 3], 187 AD3d 1495, 1496 [4th Dept 2020]; *Kazakhstan Inv. Fund v Manolovici*, 2 AD3d 249, 250 [1st Dept 2003]).

We note that, in light of our determination, plaintiff is not entitled to an award of attorneys' fees pursuant to 42 USC § 1988 (b), and we therefore vacate that award. Defendants' remaining contentions on appeal are academic.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

518

CA 19-01990

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

JOSEPH VENDETTI, PLAINTIFF-RESPONDENT,

V ORDER

STEPHEN ZYWIAK, MICHAEL SHAMMA, BRIAN HOFFMAN, KATHLEEN FREDERICK, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOSMAN LAW, LLC, BLOSSVALE (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 10, 2018. The order awarded attorneys' fees to plaintiff.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; CPLR 5501 [a] [1]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

654

CA 19-01402

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

JAMES HEALY, PLAINTIFF-RESPONDENT,

V ORDER

EST DOWNTOWN, LLC, C/O FIRST AMHERST DEVELOPMENT GROUP, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICES OF JOHN WALLACE, BUFFALO (JAMES J. NAVAGH OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered July 2, 2019. The order denied in part defendant's motion for summary judgment and granted plaintiff's motion for partial summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

655

CA 19-01403

PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

JAMES HEALY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EST DOWNTOWN, LLC, C/O FIRST AMHERST DEVELOPMENT GROUP, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICES OF JOHN WALLACE, BUFFALO (JAMES J. NAVAGH OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered July 22, 2019. The amended order denied in part defendant's motion for summary judgment and granted plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the amended order so appealed from is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages under, inter alia, Labor Law § 240 (1) for injuries he sustained while working at a mixed-use property (building) owned by defendant. Defendant thereafter moved for summary judgment seeking dismissal of the complaint, and plaintiff moved for, inter alia, summary judgment with respect to liability on the Labor Law § 240 (1) cause of action. As relevant on appeal, Supreme Court denied defendant's motion to the extent that it sought dismissal of the Labor Law § 240 (1) cause of action and granted plaintiff's motion to the extent that it sought a determination of liability under the Labor Law § 240 (1) cause of action. Defendant now appeals, and we affirm.

At all relevant times, plaintiff was employed as a maintenance and repair technician by the building's property manager. The building's maintenance staff, of which plaintiff was a member, was separate from its janitorial staff. Plaintiff's regular duties included making the building's rental properties ready for incoming tenants by, inter alia, repairing fixtures and painting. Additionally, he was tasked with responding to work orders generated by his employer in response to defendant's requests for repairs.

On the day of the accident, plaintiff responded to a "[p]est

[c]ontrol" work order filed by one of the building's commercial tenants. Specifically, the work order complained that birds were depositing excrement from a nest that was lodged in one of the building's gutters located above the tenant's entryway. Plaintiff was injured when, while attempting to remove the bird's nest, he fell from an unsecured eight-foot ladder that moved when a bird suddenly flew out of the nest.

Defendant contends that it is entitled to summary judgment dismissing the Labor Law § 240 (1) cause of action, and that plaintiff is not entitled to partial summary judgment with respect to liability on that cause of action, because plaintiff was not engaged in an activity protected by the statute at the time of the accident. We reject defendant's contention inasmuch as the parties' submissions establish, as a matter of law, that plaintiff was engaged in a protected activity under section 240 (1), i.e., cleaning, when he fell.

Labor Law § 240 (1) applies to various "types of cleaning projects" (*Soto v J. Crew, Inc.*, 21 NY3d 562, 568 [2013]), whether or not the cleaning project is "incidental to any other enumerated activity" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 680 [2007]). However, other than commercial window cleaning, which is afforded protection under the statute, "an activity cannot be characterized as 'cleaning' under the statute, if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project" (*Soto*, 21 NY3d at 568). "Whether the activity is 'cleaning' is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one [factor] is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other" (*id.* at 568-569; *see Pena v Varet & Bogart, LLC*, 119 AD3d 916, 917 [2d Dept 2014]).

Here, plaintiff's work in removing the bird's nest from one of the building's gutters was not *routine* cleaning. Plaintiff had never before been given such a task during his time working on the premises. Indeed, the reason for removing the nest was, in part, to prevent the further accumulation of bird excrement under the nest. Plaintiff's supervisor characterized the task of removing the nest as nonroutine cleaning. In addition, removing the bird's nest from the gutter, which was located above the tenant's entry door, necessarily involved elevation-related risks that are not generally associated with typical household cleaning (*see generally Soto*, 21 NY3d at 568; *Pena*, 119 AD3d at 917-918; *Collymore v 1895 WWA, LLC*, 113 AD3d 720, 721 [2d Dept 2014]). Although plaintiff's work did not necessitate the use of specialized equipment or expertise, nor was it performed in conjunction with any construction, renovation or repair project on the building

(*see Soto*, 21 NY3d at 568), those factors are not dispositive in light of the atypical nature of the work and its attendant elevation-related risks and, moreover, the fact that plaintiff's task involved the removal of extraneous materials that had formed in the gutter not due to its normal operation (*see Vernum v Zilka*, 241 AD2d 885, 885-886 [3d Dept 1997]; *cf. Soto*, 21 NY3d at 568-569; *see also Wicks v Trigen-Syracuse Energy Corp.*, 64 AD3d 75, 79 [4th Dept 2009]).

Contrary to the position of our dissenting colleagues, in *Soto*, the Court of Appeals elucidated specific facts about the plaintiff's routine work functions in that case that render it distinguishable. There, the plaintiff was employed by a custodial services contractor providing janitorial services for a retail store (*Soto*, 21 NY3d at 564). His daily work functions centered on cleaning the store, including, in particular, dusting the store after it opened (*id.*). The plaintiff in *Soto* was injured while engaged in that routine dusting (*id.* at 565). Here, in contrast, plaintiff was injured while performing a function that was not part of his regular maintenance and repair responsibilities. Indeed, as the dissent acknowledges, it is undisputed that plaintiff had never been directed to remove a bird's nest from a gutter before.

Distilled to its essence, the dissent's analysis of the *Soto* factors and resulting conclusion that plaintiff's work "did not constitute the type of 'cleaning' covered by Labor Law § 240 (1)" effectively create a categorical rule that clearing extraneous material from gutters *always* constitutes an activity excluded from the scope of "cleaning" under Labor Law § 240 (1). In our view, the totality of the circumstances here establishes that plaintiff was engaged in protected, nonroutine cleaning at the time of the accident (*cf. Soto*, 21 NY3d at 569). In reaching our conclusion, we are mindful that "[t]he statute is to be interpreted liberally to accomplish its purpose" (*Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 977 [2003]). In light of our determination, we need not consider whether plaintiff's work constituted "repairing" under section 240 (1).

We have considered defendant's remaining contentions and conclude that they do not require modification or reversal of the amended order.

All concur except PERADOTTO and LINDLEY, JJ., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent because, contrary to the majority's conclusion, plaintiff was not engaged in cleaning or any other protected activity under Labor Law § 240 (1) at the time of the accident.

Although, as the majority recognizes, "Labor Law § 240 (1) is to be construed as liberally as necessary to accomplish the purpose of protecting workers" (*Wicks v Trigen-Syracuse Energy Corp.*, 64 AD3d 75, 78 [4th Dept 2009]; *see Martinez v City of New York*, 93 NY2d 322, 325-326 [1999]), "the language of Labor Law § 240 (1) 'must not be strained' to accomplish what the [l]egislature did not intend" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 292 [2003], quoting *Martinez*, 93 NY2d at 326; *see Preston v APCH, Inc.*, 175 AD3d 850, 852

[4th Dept 2019], *affd* 34 NY3d 1136 [2020]). Thus, while it is settled law that " 'cleaning' is expressly afforded protection under section 240 (1) whether or not incidental to any other enumerated activity" (*Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 680 [2007]), the Court of Appeals has cautioned that it has "not extended the statute's coverage [of 'cleaning'] to every activity that might fit within its literal terms" (*Dahar v Holland Ladder & Mfg. Co.*, 18 NY3d 521, 526 [2012]) and that the legislature did not intend "to cover all cleaning that occurs in a commercial setting, no matter how mundane" (*Soto v J. Crew Inc.*, 21 NY3d 562, 568 [2013]). Instead, consistent with the purpose of the statute, the protected activity of " 'cleaning' " may reasonably be applied to the "types of cleaning projects that present hazards comparable in kind and degree to those presented on a construction site" (*id.*; *see Dahar*, 18 NY3d at 523-526).

In light of those principles, the Court of Appeals, framing the test in exclusionary terms, has stated that "an activity cannot be characterized as 'cleaning' under the statute, if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240 (1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project" (*Soto*, 21 NY3d at 568). "Whether the activity is 'cleaning' is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one [factor] is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other" (*id.* at 568-569).

Here, plaintiff's task involved standing on a stepladder approximately five feet above the ground in order to remove extraneous material in the form of a bird's nest from a gutter located slightly below a hard canopy over the entrance to a first story retail storefront. The nest had been formed in a hole in the gutter underneath a watertight membrane that had been installed as part of prior work by a roofing company to fix the then-leaking gutter. Applying the requisite factors, we conclude that the activity undertaken by plaintiff was not "cleaning" within the meaning of Labor Law § 240 (1).

By narrowly focusing on whether plaintiff had ever removed a bird's nest from a gutter while working on the premises and the supervisor's characterization of the work, the majority has misconstrued and misapplied the first factor. Although plaintiff himself may not have personally removed a bird's nest from a gutter before, and although the supervisor characterized "any type of gutter cleaning" as "non-routine" for his staff, those facts, while perhaps informative, are nevertheless not determinative. After all, the Court of Appeals in *Soto* did not refer in its analysis of this factor to any

specific facts adduced regarding the particular frequency with which the janitorial worker in that case was tasked during his employment with dusting shelves in the retail store; rather, the Court applied the first factor in generic, passive terms related to the nature of the task itself: "The dusting of a six-foot-high display shelf *is the type* of routine maintenance *that occurs* frequently in *a* retail store" (21 NY3d at 569 [emphasis added]).

Likewise, here, the clearing of gutters of extraneous material—whether leaves, other debris or, in this case, a bird's nest—in order to keep the storefronts thereunder clean and safe "is the *type* of job that occurs on a . . . relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises" (*id.* at 568 [emphasis added]; *see generally Leathers v Zaepfel Dev. Co., Inc.* [appeal No. 2], 121 AD3d 1500, 1503 [4th Dept 2014], *lv denied* 24 NY3d 917 [2015]; *Hull v Fieldpoint Community Assn., Inc.*, 110 AD3d 961, 962 [2d Dept 2013], *lv denied* 22 NY3d 862 [2014]; *Berardi v Coney Is. Ave. Realty, LLC*, 31 AD3d 590, 591 [2d Dept 2006]). Indeed, contrary to the majority's assertion, the record establishes that the task fell directly within the scope of plaintiff's ordinary work as a maintenance and repair technician to, as plaintiff testified at his deposition, "take care of the daily grounds" and complete "any work orders that would come in," and was not outside the scope of those routine tasks such that a subcontractor would be required. We thus conclude that clearing a gutter of extraneous material over the entrance to a first story retail storefront is the type of routine maintenance that occurs on a relatively frequent basis on a commercial portion of a mixed use property (*see Soto*, 21 NY3d at 569).

We agree with the majority with respect to the second factor that the removal of the bird's nest did not necessitate the use of any specialized equipment or expertise, nor did such removal require the unusual deployment of labor, inasmuch as the task involved a single worker using a common ladder in an attempt to remove extraneous material from the gutter by hand (*see id.*).

We further disagree, however, with the majority's application of the third factor, and we note that the majority leaves unstated the actual elevation from which plaintiff fell. The activity at issue here involved an insignificant elevation risk comparable to those inherent in typical domestic or household cleaning (*see id.* at 568-569). As the Court of Appeals has recounted, it commented in *Dahar* that, "if given the broad reading urged by [the] plaintiff, the statute would encompass virtually every kind of cleaning task, including every bookstore employee who climbs a ladder to dust off a bookshelf or every maintenance worker who climbs to a height to clean a light fixture—results never intended by the legislature" (*Soto*, 21 NY3d at 567; *see Dahar*, 18 NY3d at 526). In the case before us, plaintiff's task of standing on a stepladder approximately five feet above the ground in order to remove extraneous material from a gutter located slightly below a hard canopy over the entrance to a retail storefront "presents a scenario analogous to the bookstore [and light fixture] example[s] cited in *Dahar*," and is akin to the injured janitorial worker's task in *Soto* of standing on a four-foot-tall ladder in order

to dust a six-foot-high display shelf (*Soto*, 21 NY3d at 568; *see Dahar*, 18 NY3d at 523-526; *cf. Pena v Varet & Bogart, LLC*, 119 AD3d 916, 916 [2d Dept 2014]). In other words, the "elevation-related risks involved [here] were comparable to those encountered by homeowners during ordinary household cleaning," such as dusting the top of shelving or upper kitchen cabinetry or wiping down a ceiling-mounted fixture (*Soto*, 21 NY3d at 569).

We agree with the majority with respect to the fourth factor that plaintiff's task was "unrelated to any ongoing construction, renovation, painting, alteration or repair project" (*id.* at 568). Even crediting plaintiff's testimony that the removal of the bird's nest was a necessary step in a larger task of patching the hole in the gutter, mention of which was absent from the contemporaneously prepared work order and incident report, we reject plaintiff's contention that such task constituted alteration or repair work. Patching a single, six-inch hole with a piece of sheet metal and silicone adhesive as proposed by plaintiff would not require "a *significant* physical change to the configuration or composition of the building or structure" and, therefore, such work could not constitute an alteration (*Joblon v Solow*, 91 NY2d 457, 465 [1998]; *see Azad v 270 5th Realty Corp.*, 46 AD3d 728, 729-730 [2d Dept 2007], *lv denied* 10 NY3d 706 [2008]). Nor would patching the hole constitute repair work rather than routine maintenance inasmuch as the gutter, by plaintiff's own admission, was operable and not leaking given the prior installation of the membrane, and plaintiff's proposed "attachment of [a] metal sheet[] over the hole[] in the gutter . . . was in the nature of component replacement" necessitated by normal wear and tear (*Azad*, 46 AD3d at 730; *see generally Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). Contrary to plaintiff's further contention, even if the roofing company's prior installation of the membrane lining the gutter constituted a repair or alteration, plaintiff's attempt to remove the bird's nest and patch the hole was unrelated to the roofing company's project, which had already been completed by successfully stopping water from leaking through the use of the membrane in lieu of patching any holes in the gutter (*see Soto*, 21 NY3d at 568-569).

In view of the above discussion, the majority's mischaracterization of our analysis of the *Soto* factors as employing a categorical rule that gutter clearing of any type necessarily falls outside the protected activity of "cleaning" under Labor Law § 240 (1) merely serves to further reveal the flaws in the majority's analysis.

Based on the foregoing review of the requisite factors, we conclude that, as in *Soto* and *Dahar*, the task here did not constitute the type of "cleaning" covered by Labor Law § 240 (1). Moreover, for the reasons previously discussed, plaintiff was not performing alteration or repair work. Defendant thus met its initial burden on its motion for summary judgment dismissing the complaint with respect to the section 240 (1) cause of action by establishing that plaintiff was not engaged in a protected activity under the statute, and plaintiff failed to raise a triable issue of fact in that regard and failed to meet his initial burden on his motion with respect to liability on that cause of action. We would therefore modify the

amended order by denying that part of plaintiff's motion seeking summary judgment with respect to liability on the section 240 (1) cause of action, granting defendant's motion for summary judgment in its entirety, and dismissing the complaint.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

672

CA 19-00773

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

PATRICK STEFFEN AND MARIA STEFFEN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DIRECTV, INC., DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (WILLIAM O'CONNELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 7, 2019. The order, inter alia, granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Steffen v DirecTV, Inc*. ([appeal No. 3] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

673

CA 19-00774

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

PATRICK STEFFEN AND MARIA STEFFEN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DIRECTV, INC., DEFENDANT-RESPONDENT,
AND MASTEC NORTH AMERICA, INC., NONPARTY RESPONDENT.
(APPEAL NO. 2.)

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (WILLIAM O'CONNELL OF COUNSEL), FOR DEFENDANT-RESPONDENT AND NONPARTY RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 7, 2019. The order, inter alia, granted those parts of the motion of defendant and nonparty MasTec North America, Inc. seeking to quash a subpoena and seeking a protective order.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Steffen v DirecTV, Inc.* ([appeal No. 3] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

674

CA 19-00775

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

PATRICK STEFFEN AND MARIA STEFFEN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DIRECTV, INC., DEFENDANT-RESPONDENT,
AND MASTEC NORTH AMERICA, INC., NONPARTY RESPONDENT.
(APPEAL NO. 3.)

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (WILLIAM O'CONNELL OF COUNSEL), FOR DEFENDANT-RESPONDENT AND NONPARTY RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 7, 2019. The order denied the motion of plaintiffs to hold nonparty MasTec North America, Inc., in civil and criminal contempt.

It is hereby ORDERED that the order so appealed from is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law §§ 200, 240 (1), 241 (6) and common-law negligence action to recover damages for injuries Patrick Steffen (plaintiff) allegedly sustained while installing a satellite dish on the roof of a private residence to provide internet service from nonparty WildBlue Communications, Inc. (WildBlue). Plaintiff performed the installation as an employee of nonparty MasTec North America, Inc. (MasTec), a WildBlue subcontractor, but he drove a truck that had defendant's logo on it, wore DirecTV-branded clothes, and believed that WildBlue's internet service was a product of defendant.

Before commencing this action, plaintiffs obtained an order (pre-action disclosure order) requiring MasTec to provide certain documents related to the satellite dish installation project and MasTec's relationship with defendant. Although MasTec allegedly disclosed only a work order concerning the installation project, plaintiffs did not seek enforcement of the pre-action disclosure order before commencing the action.

After the parties engaged in several years of discovery, defendant and MasTec moved, inter alia, to quash a subpoena plaintiffs

served on MasTec and for a protective order precluding any further depositions of defendant's representatives. Plaintiffs cross-moved for, inter alia, an order directing defendant to comply with plaintiffs' document requests and directing MasTec to comply with the subpoena, arguing that additional discovery was needed because the inadequate disclosure by defendant and MasTec up to that point had concealed the existence of WildBlue as a potential party. Supreme Court denied the cross motion and granted, inter alia, that part of the motion seeking a protective order.

Plaintiffs thereafter moved for summary judgment on the issue of liability with respect to the Labor Law §§ 240 (1) and 241 (6) causes of action, and defendant moved for summary judgment dismissing the complaint, arguing that it was not a proper defendant because plaintiff did not work for it at the time of the accident and defendant had no involvement with the installation project.

In appeal No. 1, plaintiffs appeal, as limited by the brief, from an order that granted defendant's motion for summary judgment dismissing the complaint and denied plaintiffs' motion for summary judgment with respect to liability on the Labor Law §§ 240 (1) and 241 (6) causes of action. In appeal No. 2, plaintiffs appeal from the order that, inter alia, granted that part of defendant's motion seeking a protective order. In appeal No. 3, plaintiffs appeal from an order that denied their motion seeking to hold nonparty MasTec in civil and criminal contempt based on its failure to comply with the pre-action disclosure order. We affirm in all three appeals.

In appeal No. 1, we conclude that the court properly granted defendant's motion for summary judgment dismissing the complaint with respect to the Labor Law §§ 240 (1) and 241 (6) causes of action. Defendant met its initial burden on the motion of establishing that it was not an owner, contractor or agent for purposes of the Labor Law (*see generally* Labor Law §§ 240 [1]; 241 [6]). Defendant submitted evidence demonstrating that it had no involvement in the installation of the satellite dish and that plaintiff was not working for it at the time of the accident. Rather, the evidence established that WildBlue provided the internet service and the satellite dish and directed plaintiff's employer to install the satellite dish. In opposition, plaintiffs failed to raise a triable issue of fact with respect to whether defendant had any involvement in the satellite dish installation project (*cf. Rauls v DirecTV, Inc.*, 113 AD3d 1097, 1098-1099 [4th Dept 2014]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). To the contrary, the record confirms that, as of the date of the accident, plaintiffs were fully aware of WildBlue's involvement in the satellite dish installation project. In light of our determination, we further conclude that the court properly denied plaintiffs' motion for summary judgment on the issue of defendant's liability under Labor Law §§ 240 (1) and 241 (6).

In appeal No. 2, we conclude that the court did not abuse its "broad discretion in supervising the discovery process" by granting defendant's motion for a protective order (*Finnegan v Peter, Sr. & Mary L. Liberatore Family Ltd. Partnership*, 90 AD3d 1676, 1677 [4th

Dept 2011]). At that point in discovery, the disclosure had already established that the work order for the satellite installation project had been sent to MasTec from WildBlue and that there was nothing that showed that defendant was involved in the project. Moreover, plaintiffs had contemporaneously identified WildBlue as an entity involved in the installation work. The court thus properly determined that no further disclosure was warranted for plaintiffs to ascertain the precise relationship that existed among defendant, MasTec, and WildBlue.

With respect to appeal No. 3, we conclude that the court did not abuse its discretion in declining to hold MasTec in civil contempt for its failure to comply with the pre-action disclosure order (*see Matter of Mundell v New York State Dept. of Transp.*, 185 AD3d 1470, 1471 [4th Dept 2020]). To establish civil contempt under Judiciary Law § 753, the party seeking the order must show by clear and convincing evidence that there was a lawful order of the court with a clear and unequivocal mandate; that the order had been disobeyed; that the party to be held in contempt had knowledge of the court's order; and that the party seeking the order was prejudiced (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). Here, plaintiffs waited five years before seeking to hold MasTec in contempt for its failure to comply with the pre-action disclosure order, a delay that we conclude is excessive (*see e.g. Matter of Lipsig [Manus]*, 139 AD3d 600, 601 [1st Dept 2016]; *Levin v Halvin Co.*, 63 AD2d 924, 925 [1st Dept 1978]). In addition, plaintiffs were not prejudiced by MasTec's failure to comply with the pre-action disclosure order because, as noted above, plaintiffs were at all times aware of WildBlue and its involvement in the satellite dish installation project (*see generally Town of Lloyd v Moreno*, 297 AD2d 403, 405 [3d Dept 2002]).

Finally, we conclude that the court properly declined to hold MasTec in criminal contempt under Judiciary Law § 750 (A) (3). Although no finding of prejudice is required to find a party guilty of criminal contempt, here the court properly denied plaintiffs' motion because there is no evidence that MasTec's failure to comply with the pre-action disclosure order was willful (*see generally Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 239-240 [1987]; *Matter of Schmitt v Piampiano*, 117 AD3d 1478, 1479 [4th Dept 2014]).

All concur except BANNISTER, J., who dissents and votes to modify in accordance with the following memorandum: In my view, Supreme Court abused its discretion in denying that part of plaintiffs' motion seeking to hold nonparty MasTec North America, Inc. (MasTec) in civil contempt based on its failure to comply with a pre-action disclosure order. For this reason, I dissent in appeal No. 3 and would modify the order in appeal No. 3 by granting that part of the motion seeking to hold MasTec in civil contempt and remit the matter to Supreme Court to determine the appropriate sanction to be imposed (*see* Judiciary Law § 753 [A]; *see generally Beneke v Town of Santa Clara*, 61 AD3d 1079, 1081 [3d Dept 2009]).

"A finding of civil contempt must be supported by four elements:

(1) a lawful order of the court, clearly expressing an unequivocal mandate, was in effect; (2) [i]t must appear, with reasonable certainty, that the order has been disobeyed; (3) the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party; and (4) prejudice to the right of a party to the litigation must be demonstrated" (*Dotzler v Buono*, 144 AD3d 1512, 1513-1514 [4th Dept 2016] [internal quotation marks omitted]; *see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). A movant seeking a contempt order bears the burden of establishing the foregoing elements by clear and convincing evidence (*see El-Dehdan*, 26 NY3d at 29; *Belkhir v Amrane-Belkhir*, 128 AD3d 1382, 1382 [4th Dept 2015]).

Here, the court issued a pre-action disclosure order directing MasTec to produce copies of all invoices for installation work MasTec performed on the day of plaintiff Patrick Steffen's accident. MasTec admits that it did not provide plaintiffs with the invoice for the work done until *after* plaintiffs commenced the instant action, and then only after the statute of limitations against nonparty WildBlue Communications, Inc. (WildBlue) had expired. That invoice clearly identified WildBlue, and only WildBlue, as the party to sue. Moreover, MasTec did not disclose the invoice until the day before its representative was scheduled to be deposed, i.e., right before the existence of the invoice would have been discovered. Thus, plaintiffs clearly satisfied their burden with respect to the first three elements for contempt by establishing that MasTec knowingly disobeyed a mandate of the court.

Plaintiffs also established that they were prejudiced by MasTec's failure to comply with the pre-action disclosure order. Had the invoice been disclosed as required by that order, plaintiffs' counsel would have been able to identify WildBlue as the appropriate defendant and plaintiffs' suit might still be viable. The invoice indicated that, on the day of the accident, the only hardware being installed on the customer's roof was the WildBlue satellite dish that would provide the WildBlue internet service ordered by the customer. All concede that MasTec's installation of only WildBlue equipment and internet service was highly unusual.

In my view, MasTec was hiding the essential facts of the accident, and the corporate interplay between defendant, MasTec, and WildBlue was far from transparent. MasTec's insurer also insured WildBlue and defendant, and MasTec's lawyer represented all of those entities. The insurer and the lawyer were in a position to understand the import of the information on the invoice, while plaintiffs, having been deprived of the court-ordered disclosure, were unaware of the information thereon. MasTec clearly *benefitted* from its defiance of the pre-action disclosure order, and plaintiffs suffered prejudice by not having the document that the court ordered MasTec to disclose. Thus, in my view, a finding of civil contempt was warranted in this case, and the court abused its discretion in denying that part of

plaintiffs' motion.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

680.6

CA 19-00829

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

KORI GRASHA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

BOUVIER LAW LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROLAND M. CERCONE, PLLC, BUFFALO (ROLAND M. CERCONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered November 16, 2018. The order and judgment awarded plaintiff money damages against defendant Town of Amherst upon a jury verdict.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries she sustained in a motor vehicle collision. As a result of the accident, plaintiff suffered from neck pain, chronic headaches, and shoulder pain. In the seven years between the accident and trial, plaintiff pursued multiple forms of treatment, including chiropractic care, massages, Botox treatments, acupuncture, and shoulder surgery, to reduce her symptoms and regain her pre-accident level of activity.

The jury found in favor of plaintiff and, in relevant part, awarded her $115,000 for past pain and suffering and $600,000 for future pain and suffering. In appeal No. 1, Town of Amherst (defendant) appeals from an order and judgment entered upon the jury verdict. In appeal No. 2, defendant appeals from an order denying in part its motion pursuant to CPLR 4404 to set aside the verdict.

Initially, we note that the appeal from the final order and judgment in appeal No. 1 brings up for review the propriety of the order in appeal No. 2. We therefore dismiss the appeal from the order in appeal No. 2 (*see* CPLR 5501 [a]; *see generally Matter of State of New York v Daniel J.*, 180 AD3d 1347, 1348 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]).

We reject defendant's contention that the summation of plaintiff's counsel deprived defendant of a fair trial. With respect to defendant's contention that plaintiff's counsel improperly encouraged the jury to apply a time-unit formula in calculating damages for pain and suffering, we conclude that, although reference "to [a] time-unit formula for valuing pain and suffering [is] clearly an improper remark" (*Halftown v Triple D Leasing Corp.*, 89 AD2d 794, 794 [4th Dept 1982]; *see De Cicco v Methodist Hosp. of Brooklyn*, 74 AD2d 593, 594 [2d Dept 1980]), counsel here did not directly advocate the use of such a formula. Moreover, to the extent that counsel's remarks could be construed as indirectly suggesting the use of a time-unit formula, we note that counsel coupled his comments regarding the amount requested with a reminder that jurors were the sole judges of what constitutes a reasonable verdict, and we therefore conclude that any alleged error was harmless because it did not "deflect the jury from the essential task of exercising its own sound discretion in determining the appropriate award" (*Lee v Bank of N.Y.*, 144 AD2d 543, 544 [2d Dept 1988] [internal quotation marks omitted]; *see also Chlystun v Frenmer Transp. Corp.*, 74 AD2d 862, 862 [2d Dept 1980]).

With respect to defendant's remaining challenges to plaintiff's summation, the record shows that Supreme Court sustained each of defendant's relevant objections and, when requested, gave curative instructions that corrected any possible prejudice occasioned by the purportedly improper comments (*see Wilson v County of Westchester*, 148 AD3d 1091, 1092 [2d Dept 2017]).

Defendant also contends that the verdict with respect to the award of damages for past and future pain and suffering is excessive. We reject that contention. In evaluating whether the jury award is excessive, we consider whether the verdict deviates materially from what is considered reasonable compensation (*see* CPLR 5501 [c]; *Hotaling v Carter*, 137 AD3d 1661, 1662-1663 [4th Dept 2016]; *Swatland v Kyle*, 130 AD3d 1453, 1454-1455 [4th Dept 2015]; *Inya v Ide Hyundai, Inc.*, 209 AD2d 1015, 1015 [4th Dept 1994]). Because monetary awards for pain and suffering "are not subject to precise quantification . . . , we look to comparable cases to determine at which point an award deviates materially from what is considered reasonable compensation" (*Huff v Rodriguez*, 45 AD3d 1430, 1433 [4th Dept 2007] [internal quotation marks omitted]).

Here, plaintiff was 33 years old at the time of the accident and had a projected future life expectancy of 41.9 years. The evidence at trial established that, as a result of the accident, plaintiff sustained soft tissue injuries to her neck and shoulder and had suffered daily headaches, chronic neck pain, weakness and numbness in her left arm, and decreased sensation in her left hand. Plaintiff's shoulder required surgical repair, her neck and head pain persisted, and she would need continued medical care in the future. With respect to past pain and suffering, we conclude that $115,000 does not deviate materially from reasonable compensation in light of prior comparable cases (*see Barrow v Dubois*, 82 AD3d 1685, 1686-1687 [4th Dept 2011]). We further conclude that the jury's award of $600,000 for future pain

and suffering does not deviate materially from reasonable compensation (*see Keeler v Reardon*, 49 AD3d 1211, 1212 [4th Dept 2008]).

Finally, we are unable to review defendant's contention that plaintiff failed to comply with the disclosure requirements of 22 NYCRR 202.17 with respect to various medical records and reports and that she failed to disclose a lay witness to defendant until the eve of trial inasmuch as defendant failed to make a record sufficient to allow this Court to evaluate its contention (*see DeFisher v PPZ Supermarkets, Inc.*, 186 AD3d 1062, 1062 [4th Dept 2020]; *Leeder v Antonucci*, 174 AD3d 1469, 1470 [4th Dept 2019]; *Resetarits Constr. Corp. v City of Niagara Falls*, 133 AD3d 1229, 1229 [4th Dept 2015]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

680.7

CA 19-00830

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND BANNISTER, JJ.

KORI GRASHA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

BOUVIER LAW LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROLAND M. CERCONE, PLLC, BUFFALO (ROLAND M. CERCONE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered November 19, 2018. The order denied in part the motion of defendant Town of Amherst to set aside a verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same memorandum as in *Grasha v Town of Amherst* ([appeal No. 1] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

755

KAH 19-02190

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
EDWIN SUAREZ, PETITIONER-APPELLANT,

V OPINION AND ORDER

SUPERINTENDENT, LIVINGSTON CORRECTIONAL FACILITY
AND NEW YORK STATE BOARD OF PAROLE,
RESPONDENTS-RESPONDENTS.

THE LEGAL AID SOCIETY, NEW YORK CITY (ELON HARPAZ OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), dated May 3, 2019 in a habeas corpus proceeding. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the habeas corpus proceeding is converted to a CPLR article 78 proceeding in the nature of mandamus and the petition is granted to the extent of annulling that part of the determination of the Board of Parole imposing upon petitioner the school grounds mandatory condition set forth in Executive Law § 259-c (14).

Opinion by BANNISTER, J.:

Petitioner was convicted upon his plea of guilty of attempted rape in the second degree (Penal Law §§ 110.00, 130.30 [1]). At sentencing, he was adjudicated a youthful offender and was sentenced to a term of probation. Petitioner violated his conditions of probation and was resentenced to a term of incarceration. He was eventually granted parole by the Board of Parole, which issued a determination imposing various conditions of release, including, inter alia, the mandatory condition that he refrain from knowingly entering school grounds in compliance with the Sexual Assault Reform Act (SARA) (L 2000, ch 1, as amended by L 2005, ch 544; *see* Executive Law § 259-c [14]). Specifically, the conditions provided that petitioner would not be released "until a residence [was] developed and it [was] verified that such address [was] located outside the Penal Law definition of school grounds and [was] approved by the Department." Petitioner was unable to obtain a SARA-compliant residence and, as a

result, remained housed at the correctional facility despite being determined by the Board of Parole to be ready for release to parole supervision.

Petitioner commenced this habeas corpus proceeding pursuant to CPLR article 70 contending that the school grounds mandatory condition of Executive Law § 259-c (14) did not apply to him because he was adjudicated a youthful offender and thus that he was entitled to immediate release from custody. At the time he filed his petition, he had been housed at the correctional facility an additional two years beyond his release date. Supreme Court denied the petition, concluding that SARA was applicable regardless of whether a person is adjudicated a youthful offender so long as he or she served a sentence for an enumerated sex crime and the victim was under the age of 18. Petitioner appeals, and we reverse.

As an initial matter, this Court learned at oral argument on this appeal that petitioner was released from the correctional facility and is now residing in a SARA-compliant residence. As such, habeas corpus relief is not available to him (*see People ex rel. Negron v Superintendent, Woodbourne Corr. Facility*, 170 AD3d 12, 14 [3d Dept 2019], *affd* 36 NY3d 32 [2020]). Nonetheless, because this appeal concerns a condition of petitioner's release to parole, we convert the proceeding to one pursuant to CPLR article 78 (*see id.*).

The primary statute involved in this case is Executive Law § 259-c (14), which provides in relevant part:

> "[N]otwithstanding any other provision of law to the contrary, where a person serving a sentence for an offense defined in [Penal Law articles 130, 135 or 263 or Penal Law §§ 255.25, 255.26 or 255.27] and the victim of such offense was under the age of [18] at the time of such offense or such person has been designated a level three sex offender pursuant to [Correction Law § 168-l (6)], is released on parole or conditionally released pursuant to [Executive Law § 259-c (1) or (2)], the [Board of Parole] shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in [Penal Law § 220.00 (14)], . . . while one or more of such persons under the age of [18] are present . . . ."

The Penal Law defines "school grounds," in relevant part, as:

> "any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising such school" (§ 220.00 [14] [b]).

Further, Penal Law § 65.10 (4-a) (a) sets forth the mandatory conditions of probation or conditional discharge for sex offenders and mirrors much of the language of Executive Law § 259-c (14), providing in relevant part:

> "When imposing a sentence of probation or conditional discharge *upon a person convicted* of an offense defined in [Penal Law articles 130, 235 or 263 or Penal Law §§ 255.25, 255.26 or 255.27], and the victim of such offense was under the age of [18] at the time of such offense or such person has been designated a level three sex offender pursuant to [Correction Law § 168-l (6)], *the court shall require, as a mandatory condition of such sentence, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds*, as that term is defined in [Penal Law § 220.00 (14)], . . . while one or more of such persons under the age of [18] are present" (emphasis added).

Notably, none of the aforementioned statutory provisions expressly restricts the location of where a person covered by those provisions may reside, but the definition of "school grounds" under the Penal Law necessarily operates to restrict places where such a person may live and travel (*see People v Diack,* 24 NY3d 674, 682 [2015]). The Court of Appeals has stated that "[t]he practical effect is that any sex offender who is subject to the school grounds mandatory condition is unable to reside within 1,000 feet of a school or facility as defined in Penal Law § 220.00 (14) (b)" (*id.*).

In determining whether petitioner is subject to the school grounds mandatory condition, we begin with an analysis of the statutory text of Executive Law § 259–c (14). "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]; *see Matter of Anonymous v Molik*, 32 NY3d 30, 37 [2018]). "The 'literal language of a statute' is generally controlling unless 'the plain intent and purpose of a statute would otherwise be defeated' . . . Where 'the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purpose of the [statute's] enactment,' courts may '[r]esort to legislative history' " (*Anonymous*, 32 NY3d at 37).

In this case, the determination whether petitioner is subject to the school grounds mandatory condition hinges on whether, "notwithstanding any other provision of law to the contrary," petitioner was "a person serving a sentence for an offense defined in [Penal Law articles 130, 135 or 263 or Penal Law §§ 255.25, 255.26 or 255.27] and the victim of such offense was under the age of [18] at the time of such offense" (Executive Law § 259-c [14]). Here, petitioner was serving a sentence for an enumerated offense and his victim was under the age of 18 at the time of the offense. Furthermore, the phrase " 'notwithstanding any provision of law to the contrary' [is] the verbal formulation frequently employed for legislative directives intended to preempt any other potentially

conflicting statute, wherever found in the State's laws" (*People v Mitchell*, 15 NY3d 93, 97 [2010]; *see Matter of Niagara County v Power Auth. of State of N.Y.*, 82 AD3d 1597, 1601 [4th Dept 2011], *lv dismissed in part and denied in part* 17 NY3d 838 [2011]). Thus, at first blush, it appears that petitioner is covered by the statute.

However, the question then becomes whether the literal construction of Executive Law § 259-c (14) results in an absurd or unreasonable consequence that is contrary to the legislative intent. Significantly, nowhere does the statute expressly state whether the legislature intended to include persons who were adjudicated youthful offenders. Additionally, as noted, the school grounds mandatory condition as it pertains to residency is not expressly found in the statute, but is one that was interpreted as existing by the courts from an analysis of the Penal Law (*see Diack*, 24 NY3d at 682). Thus, to answer the question, we must examine the legislative history of Executive Law § 259-c (14).

In 2000, the legislature passed and the Governor signed SARA, the purpose of which was to "increase[] penalties against sex offenders, enhance[] sexual assault victim services, and close[] existing loopholes related to sex crime prosecution" (Budget Report on Bills, Bill Jacket, L 2000, ch 1). As relevant here, the legislature amended Penal Law § 65.10 and at the same time added Executive Law § 259-c (14), which set forth the school grounds mandatory condition (*see* L 2000, ch 1, §§ 7, 8). In 2005, the legislature extended the application of the school grounds mandatory condition to certain sex offenders designated a level three risk pursuant to Correction Law § 168-l (6) and adopted the broad definition of "school grounds" set forth in Penal Law § 220.00 (14) (*see* L 2005, ch 544, § 2; *see also* Executive Law § 259-c [14]).

Notably, a review of the legislative history of SARA reveals that the legislature intended to impose the school grounds mandatory condition on sex offenders (*see* Budget Report on Bills, Bill Jacket, L 2000, ch 1 ["probibit[s] child sex offenders from entering school grounds"]). A "sex offender," as defined in the Correction Law, "includes any person who is *convicted* of any of the [enumerated offenses]" (§ 168-a [1] [emphasis added]). A "sex offense" is defined as "a *conviction* of or a *conviction* of an attempt to commit [an enumerated crime]" (§ 168-a [2] [emphasis added]). Additionally, the school grounds mandatory condition as set forth in Penal Law § 65.10 (4-a) (a) expressly applies only to those persons *convicted* of the enumerated offenses.

When a sentencing court adjudicates a defendant a youthful offender, however, the conviction is "deemed vacated and replaced by a youthful offender finding" (CPL 720.20 [3]). CPL 720.35 (1) states that a youthful offender adjudication "is not a judgment of conviction for a crime or any other offense," which is in keeping with the "legislative desire not to stigmatize youths [adjudicated youthful offenders] . . . with criminal records triggered by hasty or thoughtless acts" (*People v Drayton*, 39 NY2d 580, 584 [1976], *rearg*

denied 39 NY2d 1058 [1976]). Thus, by definition, a youthful offender is not a convicted sex offender and does not fall within the category of persons intended to be restricted under SARA.

To be sure, SARA was added to enhance the penalties already imposed on certain sex offenders pursuant to the Sex Offender Registration Act (SORA) (Correction Law § 168 *et seq*.), which, like SARA, refers to conditions imposed on sex offenders released from prison (*see* Budget Report on Bills, Bill Jacket, L 2000, ch 1). While SORA's public notification and registration requirements carry a greater stigma than SARA's school ground mandatory condition, that mandatory condition was enacted for the purpose of protecting children from "sexual predators" and "limiting access" to "defined public areas where children congregate" (*Matter of Williams v Department of Corr. & Community Supervision*, 136 AD3d 147, 153 [1st Dept 2016], *appeal dismissed* 29 NY3d 900 [2017]). Nothing in the legislative history of SARA indicates that the mandatory condition was intended to be imposed on youthful offenders. Rather, the imposition of the school grounds mandatory condition on a youthful offender would run contrary to the purpose of youthful offender treatment, which is to avoid " 'the stigma and practical consequences which accompany a criminal conviction' " (*People v Francis*, 30 NY3d 737, 749 [2018]).

Recently, in *Negron* (36 NY3d at —, 2020 NY Slip Op 06935, *1), the Court of Appeals considered the other category of persons subject to the school grounds mandatory condition in Executive Law § 259-c (14), i.e., those persons "designated a level three sex offender pursuant to [Correction Law § 168-l (6)]." While the Court applied the plain language of that provision, the interpretation of that plain language resulted in a narrow application of the statute (*Negron*, 36 NY3d at —, 2020 NY Slip Op 06935, *2-3). In other words, the Court determined that the term "such person" did not apply to all level three sex offenders despite the fact that level three sex offenders are categorized as such if their "risk of repeat offense is high and there exists a threat to the public safety" (Correction Law § 168-l [6] [c]; *see Negron*, 36 NY3d at —, 2020 NY Slip Op 06935, *3-4). Rather, the Court interpreted the statute to be limited to only those level three sex offenders who committed an enumerated crime (*Negron*, 36 NY3d at —, 2020 NY Slip Op 06935, *2). In doing so, the Court recognized that the purpose of SARA was "to identify those offenders who pose the *highest* risk to children among the population of offenders being released from sentences resulting from sex crime convictions" (*see id.* at *3 [emphasis added]). Certainly, a youth who has received the benefit of a youthful offender adjudication cannot fall within the category of offenders posing the highest risk to children that was intended to be covered under SARA.

Thus, we conclude that the literal construction of the plain statutory language of Executive Law § 259-c (14) in this case and, in particular, interpreting that provision to apply to a youthful offender because he or she is simply "serving a sentence" for an enumerated crime involving a victim under the age of 18 would result in the broad application of the statute to persons unintended to be covered by the legislature. It cannot be said that youthful offenders

fall within the class of individuals the legislature intended to subject to the SARA school grounds mandatory condition.

Accordingly, we conclude that the judgment should be reversed and the petition granted to the extent of annulling that part of the determination of the Board of Parole that imposed upon petitioner, a youthful offender, the school grounds mandatory condition set forth in Executive Law § 259-c (14).

PERADOTTO and LINDLEY, JJ., concur with BANNISTER, J.; WHALEN, P.J., dissents and votes to modify in accordance with the following opinion in which CENTRA, J., concurs: We respectfully dissent inasmuch as we disagree with the conclusion of the majority that petitioner is not subject to the school grounds mandatory condition set forth in the Sexual Assault Reform Act (SARA) (L 2000, ch 1, as amended by L 2005, ch 544; *see* Executive Law § 259-c [14]; *People v Diack*, 24 NY3d 674, 682 [2015]).

Petitioner was convicted of attempted rape in the second degree (Penal Law §§ 110.00, 130.30 [1]) for the sexual assault of a 13-year-old victim. He was adjudicated a youthful offender and initially sentenced to a term of probation. He violated the conditions of his probation and, as a result, was resentenced on the original sex offense to an indeterminate term of incarceration with a maximum of 3¼ years (*see* § 60.02 [2]; CPL 410.70 [5]). Petitioner was subsequently granted parole subject to, among other things, his compliance with Executive Law § 259-c (14), which states as relevant:

> "notwithstanding any other provision of law to the contrary, where a person serving a sentence for an offense defined in article one hundred thirty . . . of the penal law and the victim of such offense was under the age of eighteen at the time of such offense . . . is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in subdivision fourteen of section 220.00 of the penal law, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present."

That provision thus "identif[ies] a group of offenders by the type of sentence being served" and further defines that group "by additionally requiring that the victim of the crime was a minor" (*People ex rel. Negron v Superintendent, Woodbourne Corr. Facility*, 36 NY3d —, —, 2020 NY Slip Op 06935, *2 [2020]). As the majority concedes, petitioner clearly falls within that narrowly defined group. Contrary to the conclusion of the majority, however, applying the literal language of the statute here would not defeat the legislative intent underlying the separate statutory youthful offender scheme (*see*

generally Matter of Anonymous v Molik, 32 NY3d 30, 37 [2018]). The legislature provided for the replacement of a conviction with a youthful offender adjudication in certain circumstances based on a "desire not to stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts which, although crimes, may not have been the serious deeds of hardened criminals" (*People v Drayton*, 39 NY2d 580, 584 [1976], *rearg denied* 39 NY2d 1058 [1976]; *see* CPL 720.20 [3]). Youthful offender treatment, however, does not exempt a youthful offender from the imposition of a punitive sentence, including a sentence of incarceration, when warranted by the youthful offender's conduct (*see* Penal Law § 60.02).

Here, petitioner's conduct warranted a sentence of incarceration and his release to parole is a continuation of his service of that sentence (*see* Penal Law § 70.40 [1] [a]). The legislature determined that the school grounds mandatory condition is a statutorily required part of a specified sex offender's service of a sentence in the community, but that provision does not create a permanent stigma that will continue to limit that offender following the completion of the sentence. Thus, applying the plain language of Executive Law § 259-c (14) is not contrary to the legislature's intent to relieve a youthful offender of a public criminal record or to provide that offender an opportunity for a fresh start once a sentence has been completed (*see generally People v Francis*, 30 NY3d 737, 748 [2018]). In the absence of any ambiguity that would permit our divergence from the plain language of Executive Law § 259-c (14), the issue whether a youthful offender serving a sentence for a specified sex offense should be exempted from the school grounds mandatory condition set forth in SARA is one for the legislature to expressly address in the first instance. We would therefore modify the judgment by converting the proceeding from one pursuant to CPLR article 70 to one pursuant to CPLR article 78 because petitioner has been released from custody to a SARA-compliant residence, and we would otherwise affirm (*see generally People ex rel. Negron v Superintendent, Woodbourne Corr. Facility*, 170 AD3d 12, 14 [3d Dept 2019], *affd* 36 NY3d — [2020]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

758

CA 19-02372

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND BANNISTER, JJ.

M&T BANK CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MOODY'S INVESTORS SERVICES, INC.,
DEFENDANT-APPELLANT. [GEMSTONE ACTION]

M&T BANK CORPORATION, PLAINTIFF-RESPONDENT,

V

MOODY'S INVESTORS SERVICES, INC.,
DEFENDANT-APPELLANT. [CAIRN ACTION]

DUANE MORRIS LLP, NEW YORK CITY (JAMES J. COSTER OF COUNSEL), AND ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO, FOR DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JODYANN GALVIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered November 6, 2019. The order, insofar as appealed from, granted those parts of the motion of plaintiff to quash a nonparty subpoena and for a protective order.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is denied in its entirety.

Memorandum: As we explained in our decision on the prior appeal in this matter (*M&T Bank Corp. v McGraw-Hill Cos., Inc.*, 126 AD3d 1414 [4th Dept 2015]), plaintiff, a financial institution, commenced these actions against defendant, an investment ratings agency, seeking to recover approximately $77 million it lost from its investment in structured finance securities. As alleged by plaintiff, it invested in notes in early 2007 that were part of certain collateralized debt obligations (CDOs). The subject CDOs were collateralized in part by residential mortgage backed securities (RMBS), which were bonds backed by pools of residential mortgage loans. A substantial portion of the CDOs were comprised of subprime RMBS. Each class of notes, or "tranche," purchased by plaintiff received a rating from defendant. Defendant was paid by the issuers of the CDOs to provide its opinion on the creditworthiness of the notes. Defendant gave the CDO tranches purchased by plaintiff its highest and second-highest ratings.

However, commencing in July 2007, the CDOs suffered multiple downgrades by defendant and, by April 2008, the CDOs defaulted and wiped out almost all of plaintiff's investment.

After modifying an order of Supreme Court by granting in further part a motion to dismiss made by defendant (*M&T Bank Corp.*, 126 AD3d at 1415, 1417-1418), the sole remaining cause of action in the complaints alleges that defendant committed fraud by issuing credit ratings for CDO tranches purchased by plaintiff that defendant knew were false and misleading. Plaintiff alleges, in pertinent part, that defendant knew in 2006 and 2007 that the credit risks of certain non-prime RMBS tranches—which included RMBS containing Alt-A loans—were increasing, yet failed to account for such increased credit risks in its ratings for CDOs collateralized by RMBS. In claiming justifiable reliance on that purported fraudulent conduct, plaintiff alleges that it "relied on credit ratings because [it] had neither the access to the same data as the rating agencies nor the capacity or analytical ability to assess the securities [it was] purchasing" (*see id.* at 1417).

Following certain related discovery, defendant served a subpoena seeking the deposition testimony of a nonparty, i.e., a former staff underwriter in plaintiff's mortgage department who had alleged in a federal action that plaintiff had not complied with underwriting and reporting standards required for mortgage loans guaranteed by the Fair Housing Administration (FHA). Plaintiff moved, in relevant part, for an order pursuant to CPLR 2304 quashing the nonparty subpoena and for a protective order pursuant to CPLR 3103 preventing the deposition of the nonparty and the use of any discovery devices to obtain information related to the nonparty or the federal action. Defendant now appeals from an order insofar as it granted the motion to that extent.

Initially, we reject defendant's contention that plaintiff was not entitled to seek to quash the nonparty subpoena. CPLR 2304, which authorizes a motion to quash a subpoena, provides as relevant here that, "[i]f the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash . . . may thereafter be made in the supreme court." Here, after defendant declined plaintiff's request that it withdraw the subpoena, plaintiff moved to, inter alia, quash the subpoena. Contrary to defendant's contention, we conclude that plaintiff, as a party in these actions, was entitled to move to quash the subpoena directed to the nonparty (*see American Heritage Realty LLC v Strathmore Ins. Co.*, 101 AD3d 1522, 1523 [3d Dept 2012], *abrogated on other grounds by Matter of Kapon v Koch*, 23 NY3d 32, 37-38 [2014]; David D. Siegel & Patrick M. Connors, New York Practice § 351 at 652 [6th ed 2018]; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2304:1; C3101:23; C3120:12).

None of defendant's contentions warrant a different result on that point. As distinguished from the present circumstances in which a party to pending litigation moves to quash a nonparty subpoena

served by another party, the inapposite authority relied upon by defendant stands for the proposition that, when a governmental agency serves an investigative subpoena on an entity or individuals and then a third person, i.e., the subject of the investigation, seeks judicial intervention to quash the subpoena, the third person must have standing to seek such relief through a proprietary interest, confidential relationship, or privilege with respect to the information sought (*see e.g. Matter of Oncor Communications v State of New York*, 218 AD2d 60, 62-63 [3d Dept 1996]; *Matter of Congregation B'Nai Jonah v Kuriansky*, 172 AD2d 35, 37 [3d Dept 1991], *appeal dismissed* 79 NY2d 895 [1992]; *38-14 Realty Corp. v New York City Dept. of Consumer Affairs*, 103 AD2d 804, 804 [2d Dept 1984], *appeal dismissed* 64 NY2d 648 [1984]). To the extent that *AQ Asset Mgt. LLC v Levine* (111 AD3d 245, 260 [1st Dept 2013]) makes no such distinction, we decline to follow it. Moreover, contrary to defendant's assertion, we did not adopt the investigative subpoena standing standard as being applicable, as a matter of law, to parties in pending litigation in *Kephart v Burke* (306 AD2d 924, 924-925 [4th Dept 2003]). There, we first rejected the plaintiff's contention that the defendants were not entitled to move to quash nonparty subpoenas issued by the plaintiff and then merely added, in dicta, that the cases relied upon by the plaintiff did not compel a different result because the defendants, in any event, did have a proprietary interest in the materials sought and those materials might have contained privileged information (*id.*). Based on the foregoing, we conclude that plaintiff here was entitled to seek to quash the nonparty subpoena.

We nonetheless agree with defendant that the court erred in granting that part of plaintiff's motion seeking to quash the nonparty subpoena. "CPLR 3101 (a) (4) allows a party to obtain discovery from a nonparty, and provides that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof' " (*Snow v DePaul Adult Care Communities, Inc.*, 149 AD3d 1573, 1574 [4th Dept 2017]; *see Matter of Barber v BorgWarner, Inc.*, 174 AD3d 1377, 1378 [4th Dept 2019], *lv denied* 34 NY3d 986 [2019]). The phrase "material and necessary" in CPLR 3101 "must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity' " (*Kapon*, 23 NY3d at 38, quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see Barber*, 174 AD3d at 1378). "An application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988] [internal quotation marks omitted]), and the burden is on the party seeking to quash a subpoena to make such a showing (*see Kapon*, 23 NY3d at 38-39; *Barber*, 174 AD3d at 1378).

As a threshold matter, we agree with defendant that a prior determination and order by Supreme Court finding that documents related to the federal action were not relevant to the present actions did not constitute the law of the case with respect to that part of the motion seeking to quash the subpoena for the nonparty's deposition

testimony and, thus, that the court was not bound by that doctrine. " 'The law of the case doctrine generally precludes relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue' " (*Matter of Murtaugh v New York State Dept. of Envtl. Conservation* [appeal No. 2], 134 AD3d 1392, 1394 [4th Dept 2015]).

Here, the issue decided by the court in its prior determination and order was only that documents related to the federal action—which according to plaintiff's own representations involved just FHA loans—were not relevant to the present actions. As defendant correctly contends, however, the court did not make any determination about the scope of the nonparty's personal knowledge and possible testimony about the non-prime Alt-A loans that partly underlie the CDOs at issue in the present actions. Thus, the issue of relevance decided in the prior determination and order is not the same as the issue presented here, i.e., the relevance of the nonparty's personal knowledge and possible testimony about the Alt-A loans, and the law of the case doctrine does not apply in such circumstances (*see Kruesi v Money Mgt. Letter*, 228 AD2d 307, 308 [1st Dept 1996], *lv denied* 88 NY2d 814 [1996]). Moreover, the prior determination and order preceded a deposition of one of plaintiff's corporate representatives, "which introduced additional evidence and raised further issues, 'thereby precluding application of the law of the case doctrine' " (*Ziolkowski v Han-Tek, Inc.*, 126 AD3d 1431, 1432 [4th Dept 2015]). In any event, even assuming, arguendo, that the law of the case doctrine applied to Supreme Court in this case, we note that the doctrine "is not binding upon this Court's review of the order" (*id.*; *see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975], *rearg denied* 37 NY2d 817 [1975]; *Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1642 [4th Dept 2017]).

On the merits, we conclude that plaintiff, in moving to quash the nonparty subpoena, failed to meet its burden of establishing "either that the discovery sought is 'utterly irrelevant' to the action[s] or that the 'futility of the process to uncover anything legitimate is inevitable or obvious' " (*Kapon*, 23 NY3d at 34; *see Wells Fargo Bank, N.A. v Confino*, 175 AD3d 533, 534-535 [2d Dept 2019]; *Barber*, 174 AD3d at 1378-1379; *Ziolkowski*, 126 AD3d at 1432). As noted, plaintiff has alleged that defendant knew in 2006 and 2007 that the credit risks of certain non-prime RMBS tranches—which included RMBS containing Alt-A loans—were increasing, yet failed to account for such increased credit risks in its ratings for CDOs collateralized by RMBS, and that plaintiff justifiably relied on those credit ratings "because [it] had neither the access to the same data as the rating agencies nor the capacity or analytical ability to assess the securities [it was] purchasing" (*see M&T Bank Corp.*, 126 AD3d at 1417). It is well established that "[w]here a 'sophisticated business person or entity . . . claims to have been taken in,' the justifiable reliance rule 'serves to rid the court of cases in which the claim of reliance is likely to be hypocritical' " (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 580 [2018]). Thus, as a general matter, plaintiff's own underwriting practices and the feedback it received thereon—specifically with respect to the origination of higher risk

non-prime Alt-A loans that plaintiff knew or should have known would be packaged into RMBS by investment banks upon their sale—are relevant to plaintiff's alleged justifiable reliance on defendant's credit ratings of the CDOs that were collateralized in part by RMBS.

More particularly with respect to the nonparty, we agree with defendant that plaintiff has not shown that the nonparty's testimony would be utterly irrelevant or that it was inevitable or obvious that taking the nonparty's deposition would be futile to uncovering anything legitimate (*see Wells Fargo Bank, N.A.*, 175 AD3d at 535; *Barber*, 174 AD3d at 1378-1379; *Ziolkowski*, 126 AD3d at 1432). Although plaintiff, relying on the affidavit of the nonparty's former supervisor, contends that the nonparty "does not have the extensive knowledge that [defendant] claims," the former supervisor confirmed that the nonparty had some mortgage underwriting authority with respect to non-agency Alt-A loans and that underwriting those loans comprised nearly one-tenth of the nonparty's work. Thus, plaintiff's own submissions suggest that the nonparty has at least some knowledge of plaintiff's underwriting practices with respect to the non-prime loans at issue here, and thus it cannot be said on this record that taking the nonparty's deposition would be futile or that the testimony would be utterly irrelevant. We note in any event that even a " 'witness's sworn denial of any relevant knowledge,' . . . [would be] insufficient, standing alone, to establish that the discovery sought is utterly irrelevant to the action or that the subpoena, if honored, [would] obviously and inevitably fail to turn up relevant evidence" (*Barber*, 174 AD3d at 1379). We therefore conclude that the court erred in granting that part of plaintiff's motion seeking to quash the nonparty subpoena.

Finally, we also agree with defendant that the court erred in granting that part of plaintiff's motion seeking a protective order (*see Riordan v Cellino & Barnes, P.C.*, 84 AD3d 1737, 1739 [4th Dept 2011]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

760

CA 20-00192

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND BANNISTER, JJ.

JAMES A. GARDNER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WHITNEY ALLYSON ZAMMIT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATE RIGHTER GARDNER, DECEASED, DEFENDANT-RESPONDENT.

JAMES P. RENDA, BUFFALO, FOR PLAINTIFF-APPELLANT.

ROBSHAW & VOELKL, WILLIAMSVILLE, LAW OFFICE OF BARBARA A. KILBRIDGE, BUFFALO (BARBARA A. KILBRIDGE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 12, 2019. The order, insofar as appealed from, denied the motion of plaintiff for summary judgment seeking the dismissal of defendant's counterclaim for a downward modification of maintenance.

It is hereby ORDERED that the order so appealed from is affirmed without costs.

Memorandum: On a prior appeal, we determined that the Separation and Property Settlement Agreement (settlement agreement) between plaintiff and defendant's decedent, which was incorporated but not merged into a judgment of divorce, unequivocally provided that the maintenance payments to plaintiff were intended to survive decedent's death and become an obligation of her estate (*Gardner v Zammit*, 185 AD3d 1405, 1406 [4th Dept 2020]). Plaintiff now appeals from an order insofar as it denied his motion for summary judgment seeking dismissal of defendant's counterclaim for downward modification of the maintenance obligation. We affirm.

Plaintiff contends that Supreme Court erred in denying the motion on the ground that defendant's counterclaim for downward modification pleaded an incorrect legal standard and, therefore, failed to state a cause of action. That contention is devoid of merit. The law is clear that "[p]leadings shall be liberally construed" and that "[d]efects shall be ignored if a substantial right of a party is not prejudiced" (CPLR 3026). Here, affording the counterclaim the requisite liberal construction, we conclude that defendant indisputably sought a downward modification of the maintenance obligation under the settlement agreement and merely recited the wrong

legal standard by which she would have to establish entitlement to such relief. Moreover, plaintiff is aware that defendant has to show "extreme hardship" (Domestic Relations Law § 236 [B] [9] [b] [1]), which defendant repeatedly acknowledged as the correct legal standard in the proceedings below and does not dispute on appeal. Plaintiff was not prejudiced by the error in the counterclaim, and thus the defect must be ignored (*see* CPLR 3026).

Next, inasmuch as plaintiff expressly assumes that defendant has "standing" to seek a downward modification pursuant Domestic Relations Law § 236 and thus does not raise on appeal any challenge related thereto, that issue is not properly before us (*see Matter of Wilson v McGlinchey*, 305 AD2d 879, 880-881 [3d Dept 2003], *affd* 2 NY3d 375 [2004]; *Town of N. Hempstead v Village of N. Hills*, 38 NY2d 334, 341-342 and n 4 [1975]). Instead, plaintiff contends that the court erred in denying the motion on the ground that "the parties contractually eliminated prospective modification" of the maintenance obligation by the terms of the settlement agreement and a contemporaneously executed security agreement. We conclude that plaintiff's contention lacks merit (*see generally Katz v Katz*, 188 AD2d 827, 827 [3d Dept 1992]).

We further conclude that plaintiff is not entitled to summary judgment dismissing the counterclaim on the basis of the evidentiary submissions in the record before us. To the extent that plaintiff contends that he is entitled to summary judgment based on the lack of evidence regarding the value of the estate, we note that it is well settled that "[a] moving party must affirmatively establish the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980 [4th Dept 1995]). In any event, even assuming, arguendo, that plaintiff met his initial burden by establishing that the estate had sufficient assets such that defendant could not show extreme hardship in the absence of a downward modification, we conclude that defendant raised a triable issue of fact whether the continued enforcement of the maintenance obligation would pose an extreme hardship by submitting evidence in admissible form that decedent's income stopped upon her death, the estate earned only de minimis interest and dividends, and the estate had limited assets (*see Hawley v Hawley*, 247 AD2d 806, 807-808 [3d Dept 1998]; *see generally Marrano v Marrano*, 23 AD3d 1104, 1105 [4th Dept 2005]).

All concur except BANNISTER, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. As acknowledged by my colleagues, this Court recently held that plaintiff and defendant's decedent entered into a Separation and Property Settlement Agreement (settlement agreement), which was incorporated but not merged into a judgment of divorce, whereby decedent agreed to pay lifetime maintenance to plaintiff that continued even in the event of decedent's death (*Gardner v Zammit*, 185 AD3d 1405, 1406 [4th Dept 2020]). Plaintiff thereafter moved for summary judgment dismissing defendant's counterclaim for a downward modification of the maintenance obligation. Plaintiff now appeals from an order insofar as it denied that motion. In my view, Supreme Court erred in denying the motion, and I would therefore reverse the

order insofar as appealed from, grant the motion, and dismiss the counterclaim.

To modify a separation agreement that is incorporated but not merged into a divorce judgment, the party seeking the modification must "make 'a showing of extreme hardship' " (*Marrano v Marrano*, 23 AD3d 1104, 1105 [4th Dept 2005], quoting Domestic Relations Law § 236 [B] [9] [b] [1]; *see Leo v Leo*, 125 AD3d 1319, 1319 [4th Dept 2015]). "Extreme hardship" is not defined by the statute, and a finding of extreme hardship is necessarily fact-based and varies with the circumstances of each case. Prior case law, however, provides guidance on that issue. For example, extreme hardship has been determined to exist where a party is unable to be self-supporting or is likely to become a public charge (*see Daye v Daye*, 170 AD2d 963, 964 [4th Dept 1991]; *see also Cavallaro v Cavallaro* [appeal No. 2], 278 AD2d 812, 812 [4th Dept 2000], *lv dismissed* 96 NY2d 792 [2001]), is rendered unable to work due to physical disability (*see Matter of Alexander v Alexander*, 203 AD2d 949, 950 [4th Dept 1994]), or experiences a substantial decrease in income following the time of the separation agreement due to factors outside of the party's control (*see Marrano*, 23 AD3d at 1104-1105).

Here, defendant is unable to show extreme hardship under the circumstances presented. Pursuant to the Domestic Relations Law, "[w]here . . . [a separation agreement] remains in force, no modification of an order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship *on either party*" (§ 236 [B] [9] [b] [1] [emphasis added]). A modification of maintenance based on extreme hardship is thus, *personal* to the parties who contracted as to the amount of maintenance in the separation agreement and, as noted, a modification of that amount has only been awarded in situations involving personal hardships. In my view, an "estate" can never establish a personal hardship and thus, is never entitled to a downward modification of maintenance. While defendant in this case submitted evidence that the continued payment of the maintenance obligation would pose a hardship on the *estate*, such a hardship is not upon any party to the settlement agreement. Indeed, it is only a hardship upon the beneficiaries of decedent's estate who wish to maximize their inheritance. In my view, any difficulty in the estate's ability to pay the amount of lifetime maintenance agreed to by decedent is an issue that should be raised by the estate in the probate court when determining the reserve funds to be set aside to satisfy the maintenance obligation.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

763

CA 19-01591

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND BANNISTER, JJ.

GREGORY ROY HORST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DEFENDANT-RESPONDENT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KRISTEN E. SMITH, CORPORATION COUNSEL, SYRACUSE (SARAH KNICKERBOCKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered August 12, 2019. The order granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated.

Memorandum: Plaintiff commenced this negligence action seeking to recover damages for injuries he sustained when he was thrown from his bicycle after riding it into a pavement cutout in a street, which was located along the curb at the base of a sidewalk ramp and was concealed at that time by a puddle. Plaintiff appeals from an order granting the motion of defendant seeking summary judgment dismissing the complaint on the ground of lack of prior written notice. We reverse.

"Prior written notice of a defective or unsafe condition of a road or [sidewalk] is a condition precedent to an action against a municipality that has enacted a prior notification law" (*Hawley v Town of Ovid*, 108 AD3d 1034, 1034-1035 [4th Dept 2013]; *see Gorman v Town of Huntington*, 12 NY3d 275, 279 [2009]; *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). With respect to the parties' respective burdens on a municipal defendant's motion for summary judgment asserting the absence of the subject condition precedent, the Court of Appeals has made clear that "[w]here the [municipality] establishes that it lacked prior written notice under [a prior notification law], the burden shifts to the plaintiff to demonstrate [the existence of a triable issue of fact as to the requisite written notice or] the applicability of one of [the] two recognized exceptions to the rule—that the municipality affirmatively created the defect through an

act of negligence or that a special use resulted in a special benefit to the locality" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *accord Groninger v Village of Mamaroneck*, 17 NY3d 125, 129 [2011]).

Plaintiff nonetheless contends that defendant, in order to meet its initial burden on the motion, had to establish *both* that it did not receive proper written notice *and*, because plaintiff so alleged in the pleadings, that it did not create the defect. Plaintiff's contention relies on a line of Second Department cases (*see e.g. Nigro v Village of Mamaroneck*, 184 AD3d 842, 843 [2d Dept 2020]; *Beiner v Village of Scarsdale*, 149 AD3d 679, 680 [2d Dept 2017]; *Hill v Fence Man, Inc.*, 78 AD3d 1002, 1004 [2d Dept 2010]), which we decline to follow. The broader burden endorsed by the Second Department in such circumstances is contrary to *Yarborough* and its progeny (*see generally* Kenneth L. Gartner, *Pothole Laws, Appellate Courts, and Judicial Drift*, 19 J App Prac & Process 173, 184-185 [2018]), and contrary to our current case law applying standard *Yarborough* burden-shifting even where the plaintiff alleges in the pleadings that the municipality created the dangerous condition (*see Benson v City of Tonawanda*, 114 AD3d 1262, 1262-1263 [4th Dept 2014]).

In addition, principles of summary judgment do not support the Second Department's approach. It is well established that "[a] party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Where, as here, a municipality moves for summary judgment on its defense asserting the lack of written notice as a condition precedent to suit, the municipality sufficiently establishes that statutorily created defense by demonstrating, in the absence of any further requirement under the applicable prior notification law, that it did not receive prior written notice in the manner prescribed by the law (*see Groninger*, 17 NY3d at 129; *Gorman*, 12 NY3d at 279-280). If the municipality establishes its prima facie entitlement to summary judgment based on the lack of prior written notice, "the burden shifts to the plaintiff to come forward with evidentiary proof in admissible form demonstrating 'the existence of material issues of fact which require a trial of the action' " (*Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 56 [2014]). Such material issues of fact could relate to receipt of the requisite written notice itself or to the applicability of either of the judicially recognized exceptions to the statutory protection afforded to the municipality by the prior notification law (*see Groninger*, 17 NY3d at 129; *Yarborough*, 10 NY3d at 728; *see generally Amabile*, 93 NY2d at 474-476).

Contrary to plaintiff's contention, we did not deviate from our case law and adopt the Second Department's approach in *Beagle v City of Buffalo* (178 AD3d 1363 [4th Dept 2019]). In that case, we merely determined on the record before us that the municipal defendant's own submissions in support of its motion for summary judgment raised a

triable issue of fact whether it affirmatively created a dangerous condition (*id.* at 1366). Our determination that a municipal defendant's own papers defeated its entitlement to summary judgment by raising a triable issue of fact as to its affirmative creation of the alleged defect, thereby requiring denial of the motion (*see* CPLR 3212 [b]), is not the same as holding that a municipal defendant must, in the first instance as a matter of law, establish both that it did not receive proper written notice and that it did not create the defect when a plaintiff so alleges in the pleadings.

Applying the applicable legal standard, we conclude that defendant met its initial burden on the motion. Section 8-115 (1) of the Charter of the City of Syracuse states, in relevant part, that "[n]o civil action shall be maintained against the city for damages or injuries to person or property sustained in consequence of any street . . . being defective, out of repair, unsafe, dangerous or obstructed unless previous to the occurrence resulting in such damages or injury written notice of the defective, unsafe, dangerous, obstructed condition of said street . . . was actually given to the commissioner of public works and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of." Here, defendant met its initial burden by submitting the affidavit of its commissioner of public works establishing that he did not receive prior written notice of the allegedly dangerous or defective condition in the street as required by its prior notification law (*see Simpson v City of Syracuse*, 147 AD3d 1336, 1337 [4th Dept 2017]; *Duffel v City of Syracuse*, 103 AD3d 1235, 1235 [4th Dept 2013]; *Hall v City of Syracuse*, 275 AD2d 1022, 1023 [4th Dept 2000]; *see generally Groninger*, 17 NY3d at 129). As a result, the burden shifted to plaintiff to demonstrate the existence of a triable issue of fact as to the requisite written notice or, as relevant here, the applicability of the affirmative negligence exception (*see Groninger*, 17 NY3d at 129; *Yarborough*, 10 NY3d at 728; *Simpson*, 147 AD3d at 1337).

We conclude that plaintiff failed to meet its burden of demonstrating the existence of a triable issue of fact as to the requisite written notice. It is well established that " '[p]rior written notice provisions, enacted in derogation of common law, are always strictly construed' " (*Gorman*, 12 NY3d at 279, quoting *Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]; *see Doremus v Incorporated Vil. of Lynbrook*, 18 NY2d 362, 366 [1966]). Thus, not "every written complaint to a municipal agency necessarily satisfies the strict requirements of prior written notice"; nor is it true that "any agency responsible for fixing the defect that keeps a record of such complaints has, ipso facto, qualified as a proper recipient of such notice" (*Gorman*, 12 NY3d at 279). "Simply put, whereas a written notice of defect is a condition precedent to suit, a written request to any municipal agent other than a statutory designee that a defect be repaired is not" sufficient to comply with the strict requirements of the law (*id.*). Similarly, "a verbal or telephonic communication to a municipal body that is reduced to writing [does not] satisfy a prior written notice requirement" (*id.*; *see Hernandez v City of Syracuse*,

164 AD3d 1609, 1609 [4th Dept 2018]; *Tracy v City of Buffalo*, 158 AD3d 1094, 1094 [4th Dept 2018]).

Here, plaintiff's submissions raised the possibility that a complaint about a defect at the subject location submitted to defendant two days prior to plaintiff's accident via its CityLine citizen reporting system was submitted online rather than by telephone (*cf. Hernandez*, 164 AD3d at 1609) and, thus, there is an issue of fact whether that complaint constituted the requisite "written notice" under the prior notification law (Syracuse City Charter § 8-115 [1]; *see Van Wageningen v City of Ithaca*, 168 AD3d 1266, 1267 [3d Dept 2019]; *cf. Wolin v Town of N. Hempstead*, 129 AD3d 833, 835 [2d Dept 2015]). Nonetheless, the prior notification law, which must be strictly construed, also requires that written notice be "actually given to the commissioner of public works" (Syracuse City Charter § 8-115 [1]), and plaintiff failed to raise a triable issue of fact in that regard. Inasmuch as the deposition testimony of defendant's employees submitted by plaintiff established that CityLine complaints were simply received by complaint investigators and routed through a computer system to the appropriate department, and that such complaints were stored solely in the electronic file on the computer system, there is no indication in the record that such complaints were actually given to the commissioner of public works as required by the prior notification law (*see Gorman*, 12 NY3d at 279-280). Moreover, the only reasonable inference to be drawn from this record is that CityLine complaints were maintained in an electronic format and were separate from the written notices kept in the office of the commissioner of public works. Plaintiff nonetheless asserts that there is a material issue of fact whether CityLine complaints were actually given to the commissioner of public works because such complaints were submitted to the department that he oversees and he may have had access to the those complaints through the computer system. We conclude that those assertions are insufficient to defeat defendant's motion for summary judgment because the applicable law requires that written notice be actually given to the commissioner of public works, not just the department he oversees (*cf. Van Wageningen*, 168 AD3d at 1267), and the suggestion that he may have had access to the CityLine complaints is speculative (*see Wisnowski v City of Syracuse*, 213 AD2d 1069, 1070 [4th Dept 1995]; *see also Hall*, 275 AD2d at 1023).

We agree with plaintiff, however, that he met his burden with respect to the affirmative negligence exception by raising a triable issue of fact whether defendant "affirmatively created the defect through an act of negligence . . . 'that immediately result[ed] in the existence of a dangerous condition' " (*Yarborough*, 10 NY3d at 728; *see Simpson*, 147 AD3d at 1337). Here, plaintiff submitted the deposition of defendant's public works superintendent, who testified that defendant was solely responsible for repairing potholes and did not subcontract for that work, but that a contractor was used for sidewalk, ramp, and curb work. If the contractor was putting a curb in, it would perform a cut in the street. Upon viewing the photograph of the subject defect, the superintendent testified that the defect was not a pothole and, instead, was a hole deliberately created as

part of work on the curb. The photograph of the pavement cutout, also submitted by plaintiff in opposition to the motion, is consistent with the superintendent's assessment. Inasmuch as the superintendent testified that defendant did not perform that type of work, but that the cut in the street was consistent with the curb work that the contractor performed on defendant's behalf, there is circumstantial evidence that defendant created the defect through its contractor's actions and, thus, a triable issue of fact whether the affirmative negligence exception applies (*see Santelises v Town of Huntington*, 124 AD3d 863, 865-866 [2d Dept 2015]; *Tumminia v Cruz Constr. Corp.*, 41 AD3d 585, 586 [2d Dept 2007]; *Smith v City of Syracuse*, 298 AD2d 842, 843 [4th Dept 2002]; *see generally Wittorf v City of New York*, 23 NY3d 473, 479 [2014]; *Steuer v Town of Amherst*, 300 AD2d 1104, 1105 [4th Dept 2002]). We reject defendant's contention that plaintiff is improperly relying on speculation in that regard. The superintendent's testimony that the subject defect was deliberately created by cutting the street as part of curb work and that the contractor performed that type of work on behalf of defendant is based on his personal knowledge and professional expertise, not speculation (*see Smith*, 298 AD2d at 843), and plaintiff is entitled under these circumstances to rely on circumstantial evidence that an agent of defendant created the defect (*see Guimond v Village of Keeseville*, 113 AD3d 895, 898 [3d Dept 2014]). We thus conclude that the court erred in granting defendant's motion.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

787

CA 19-00070

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

KELLY ZUZZE, PLAINTIFF-RESPONDENT,

V ORDER

BRYAN N. BUTLER, M.D., AND BUFFALO MEDICAL GROUP, P.C., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered December 10, 2018. The order, insofar as appealed from, denied in part the cross motion of defendants for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

788

CA 19-00293

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

KELLY ZUZZE, PLAINTIFF-RESPONDENT,

V ORDER

BRYAN N. BUTLER, M.D., AND BUFFALO MEDICAL GROUP, P.C., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 2, 2019. The order granted the motion of plaintiff to dismiss defendants' first affirmative defense.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

789

CA 19-01321

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

KELLY ZUZZE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRYAN N. BUTLER, M.D., AND BUFFALO MEDICAL GROUP, P.C., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Henry J. Nowak, J.), entered July 1, 2019. The judgment dismissed the amended complaint upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained as a result of defendants negligently performing a hand-assisted laparoscopic, total proctocolectomy with permanent Brooke ileostomy to treat plaintiff's ulcerative colitis. She alleges that, during the proctocolectomy portion of the surgery, i.e., the portion of the surgery where her rectum was removed, defendant Bryan N. Butler, M.D. negligently severed her sacral nerves which caused her to sustain total loss of bladder function and resulted in an inability to urinate and, subsequently, stage IV kidney failure. After trial, the jury returned a verdict finding that Butler was not negligent in the performance of the surgery. Supreme Court denied plaintiff's motion pursuant to CPLR 4404 (a) to set aside the verdict, and subsequently entered judgment dismissing the amended complaint. We affirm.

On appeal, plaintiff contends that the court erred by not granting her motion to set aside the verdict and awarding a new trial because defendants' theory of the case at trial impermissibly deviated from the theory set forth in their pretrial expert disclosures and on their cross motion for summary judgment, which resulted in a "trial by ambush." We disagree and conclude that a new trial is not warranted "in the interest of justice" because there was no showing that "substantial justice has not been done" (*Stevens v Atwal* [appeal No.

2], 30 AD3d 993, 994 [4th Dept 2006] [internal quotation marks omitted]). Specifically, plaintiff argues that defendants' pretrial theory of the case was that plaintiff suffered mere temporary loss of bladder function, and that defendants' theory of the case improperly changed midtrial when one of their experts testified, upon cross-examination by plaintiff, that 10 percent of patients who underwent the type of surgery performed on plaintiff suffered permanent issues voiding their bladder. Plaintiff moved to strike the offending expert testimony and, in our view, the court did not abuse its discretion in denying that motion (*see generally Rivera v City of New York*, 107 AD2d 331, 335 [1st Dept 1985], *appeal dismissed* 66 NY2d 912 [1985]).

Even assuming, arguendo, that the court erred by not striking that testimony, we conclude that the court did not err in denying plaintiff's motion to set aside the verdict inasmuch as substantial justice was done in this case because defendants' theory of the case did not change during trial (*see generally Stevens*, 30 AD3d at 994). Indeed, the trial record belies such a conclusion. Specifically, Butler and defendants' expert witnesses all consistently testified that Butler did not sever plaintiff's sacral nerves and that, immediately after the surgery, plaintiff sustained temporary loss of bladder function. Indeed, defendants' witnesses denied that plaintiff suffered a permanent injury and, instead, testified that she still had bladder function and sensation after the surgery, and that any permanent loss of bladder function was the result of plaintiff's failure to self-catheterize pursuant to the advice of her doctors. Thus, defendants' experts did not materially deviate from the pretrial expert disclosure or defendants' posture in their cross motion for summary judgment.

To the extent that there was testimony at trial establishing that a permanent bladder injury was an acceptable risk of the surgery, we note that such evidence was first raised by plaintiff's counsel during his direct examination of Butler. Regardless, any such testimony did not constitute a prejudicial change in defendants' theory of the case because the challenged testimony was phrased generically, and at no time did Butler or any of defendants' experts opine that plaintiff suffered permanent loss of bladder function because of the surgery.

In light of the foregoing, defendants' contentions regarding alternative grounds for affirming the judgment dismissing the amended complaint (*see generally Matter of Tehan [Tehan's Catalog Showrooms, Inc.]* [appeal No. 2], 144 AD3d 1530, 1531 [4th Dept 2016]) are academic.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

792

CA 20-00533

PRESENT: SMITH, J.P., NEMOYER, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

DOROTHY REAMES, AS EXECUTRIX OF THE ESTATE OF
H. CARLTON REAMES, DECEASED, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE THRUWAY
AUTHORITY AND NEW YORK STATE CANAL CORPORATION,
DEFENDANTS-RESPONDENTS.
(CLAIM NO. 120260.)

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), AND GREENE REID & POMEROY, PLLC, FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an amended judgment of the Court of Claims (Glen T. Bruening, J.), dated August 28, 2019. The amended judgment dismissed the claim.

It is hereby ORDERED that the amended judgment so appealed from is affirmed without costs.

Memorandum: H. Carlton Reames (decedent) sustained fatal injuries when the vehicle in which he was riding as a passenger crashed into an out-of-commission bridge. As executrix of decedent's estate, claimant commenced this wrongful death action alleging, inter alia, that defendants were negligent in the operation and maintenance of the bridge by creating a dangerous condition on the bridge, i.e., using a steel box beam as a barrier at the entrance to the bridge. On claimant's prior appeal from a judgment dismissing the claim after a nonjury trial, we determined, inter alia, that the Court of Claims erred in dismissing the claim insofar as it alleges that defendants created a dangerous condition that constituted a proximate cause of decedent's injuries (*Reames v State of New York*, 158 AD3d 1117, 1119 [4th Dept 2018]), and that "defendants' decision to weld a steel box beam across the front of the [b]ridge, at a height that allowed a motor vehicle to proceed under the beam, constituted the creation of a dangerous condition as a matter of law" (*id.* at 1119). We modified the judgment by reinstating the claim insofar as it alleges that defendants created a dangerous condition that constituted a proximate cause of decedent's injuries, and we remitted the matter to the Court of Claims to determine "whether the steel box beam was a substantial factor in aggravating decedent's injuries and causing his death"

(*id.*).

Upon remittal, the court determined that defendants' negligence in installing the steel box beam was not a substantial factor in aggravating decedent's injuries and causing his death because decedent would have been injured even if defendants had installed a W-beam barricade, which is the type of barrier required by the Department of Transportation's standards for the closure of a bridge. Claimant now appeals from an amended judgment dismissing the claim, and we affirm.

"On appeal from a judgment entered after a nonjury trial, this Court has the power to set aside the trial court's findings if they are contrary to the weight of the evidence and to render the judgment we deem warranted by the facts, although [w]e must give due deference . . . to the court's evaluation of the credibility of the witnesses and quality of the proof . . . and review the record in the light most favorable to sustain the judgment . . . Moreover, [o]n a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Ramulic v State of New York*, 179 AD3d 1494, 1495 [4th Dept 2020] [internal quotation marks omitted]).

Contrary to claimant's contention, we conclude that a fair interpretation of the evidence supports the court's determination that the steel box beam was not a substantial factor in aggravating decedent's injuries and causing his death. Claimant's witnesses testified with respect to the type of barrier that defendants were required to use to block access to the bridge, i.e., a W-beam. Claimant also presented evidence that decedent's impact with a W-beam would have led to the same result, i.e., a fatality.

We reject claimant's contention that the court's determination violates the directive in *Brown v State of New York* (31 NY3d 514 [2018]) that accident victims are not required to "identify a specific remedy and prove it would have been timely implemented and prevented the accident" (*id*. at 520). In our view, *Brown* does not preclude the court from considering whether decedent was just as likely to have suffered the same injuries in the absence of defendants' negligence. Most importantly, however, it was claimant that framed the issue and presented evidence that defendants needed to comply with the Department of Transportation standards for a permanent bridge closure by installing a W-beam. Although that evidence supports the conclusion that defendants created a dangerous condition by not installing a W-beam, and instead installing a steel box beam, it also permitted the court to determine that decedent would have been injured and killed even if the W-beam barricade had been used. "According considerable deference to the findings of the [court], as is appropriate" (*Reames*, 158 AD3d at 1118 [internal quotation marks omitted]), we conclude that the court's determination with respect to the proximate cause question that we posed to it on remittal is based on a fair interpretation of the evidence (*cf. Matter of Kirisits v State of New York*, 107 AD2d 156, 158-159 [4th Dept 1985]).

We note that the concerns raised by our dissenting colleagues are not raised by claimant on appeal. Our review is limited to the issues raised by claimant (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Furthermore, we do not use a "but for" standard of causation in resolving claimant's appeal. As we clearly state above, a fair interpretation of the evidence supports the court's determination that the steel box beam was not a substantial factor in aggravating decedent's injuries and causing his death.

In light of the foregoing, claimant's remaining contention is academic.

All concur except NEMOYER and CURRAN, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent because we disagree with the majority's conclusion that the Court of Claims fully and properly addressed the issues presented to it on remittal. We would therefore reverse the amended judgment, reinstate the claim insofar as it alleges that defendants created a dangerous condition that proximately caused decedent's injuries, and remit the matter to the Court of Claims to address the issues presented to it in our prior remittal. In our prior decision in this case, we directed the court to consider "whether the steel box beam was a substantial factor in aggravating decedent's injuries and causing his death" (*Reames v State of New York*, 158 AD3d 1117, 1119 [4th Dept 2018]). On that remittal, however, we submit that the court did not adequately address whether defendants' negligence, a matter we previously decided in claimant's favor, was a *proximate cause* in aggravating decedent's injuries from the accident (*see id.*; *Matter of Kirisits v State of New York*, 107 AD2d 156, 158 [4th Dept 1985]).

In concluding that the court properly dismissed the claim, the majority holds that the court could consider whether "decedent was just as likely to have suffered the same injuries in the absence of defendants' negligence" and that the evidence in the record allowed the court to determine that "decedent would have been injured and killed even if the W-beam barricade had been used." There are two material flaws to the majority's analysis.

Initially, we respectfully submit that the majority's analysis errs by adopting an incorrect standard of causation. In concluding that the court could consider whether "decedent was just as likely to have suffered the same injuries in the absence of defendants' negligence," the majority improperly elected to apply a "but for" standard of causation, rather than considering whether the negligence was a *proximate cause* of injury. In our view, applying a "but for" causation standard "would relieve from liability a negligent actor if the same harm might have been sustained had the actor not been negligent; yet the law is clear that that fact may be considered in fixing damages but does not relieve from liability" (1A NY PJI3d 2:70 at 435 [2020], citing *Dunham v Village of Canisteo*, 303 NY 498, 505-506 [1952]). Instead, the inquiry is whether defendants' negligence was a *substantial factor* in aggravating decedent's injuries and in bringing about his death (*see Merino v New York City Tr. Auth.*, 89 NY2d 824, 825 [1996]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308,

315 [1980], *rearg denied* 52 NY2d 784 [1980]; *Ricchiazzi v Gray*, 5 AD3d 1085, 1086 [4th Dept 2004]).

Here, even if the court concluded that decedent's death would have inevitably ensued from a collision with the W-beam barricade, that conclusion "may be considered in fixing damages but does not relieve [defendants] from liability" for their established negligence (1A NY PJI3d 2:70 at 435 [2020]). Inasmuch as liability is premised on negligence *and* proximate cause, consideration of any possible effect of using a W-beam barricade is premature until after the court determines liability in claimant's favor and proceeds to ascertain damages for any increased or aggravated injuries and the attendant pain and suffering, if any, attributable to what we previously determined to be defendants' negligence.

In any event, even if we could consider the possible effects of the W-beam barricade during the liability phase, we respectfully submit that the majority's analysis is still flawed. It is undisputed that the evidence in the record established that, unlike the driver of the convertible motor vehicle, decedent was not instantaneously killed when the car collided with the steel box beam erected at the bridge's southern boundary (southern steel box beam). Indeed, decedent remained in the vehicle as it proceeded through a "bridge closed" sign, then passed under the southern steel box beam that killed the driver, along the western guard rail of the bridge, and under the slightly higher steel box beam erected at the bridge's northern boundary (northern steel box beam). The vehicle ultimately came to a rest shortly after it passed under the northern steel box beam. The evidence in the record established that decedent's head trauma occurred when he struck the northern steel box beam. It also established that decedent survived the accident for an additional 18 hours, at which point he succumbed to "[c]ranio-cerebral injuries" caused by the "automobile-fixed object collision."

In other words, the evidence in the record supports the conclusion, left unconsidered by the court, that decedent's injuries were not identical to those he would have suffered had he been *instantaneously* killed by a collision with the alternative W-beam barricade. Thus, the court erred by failing to consider whether there was an *aggravation* of decedent's injuries that were proximately caused by defendants' negligence in erecting the steel box beams on both sides of the bridge.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

796

KA 15-01725

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHEEN W. BELL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered July 22, 2015. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]). In appeal No. 2, defendant appeals from a judgment convicting him, upon the same jury verdict, of conspiracy in the second degree (§ 105.15). In appeal No. 3, defendant appeals, by leave of a Justice of this Court, from an order denying his motion pursuant to CPL article 440 to vacate the foregoing judgments, without a hearing. We affirm in each appeal.

Viewing the evidence independently and in light of the elements of the crime of murder in the second degree as charged to the jury (*see generally People v Danielson*, 9 NY3d 342, 348-349 [2007]), we reject defendant's contention in appeal No. 1 that the verdict convicting him of that crime is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention in appeal No. 2, the conviction of conspiracy in the second degree is supported by legally sufficient evidence (*see generally People v Caban*, 5 NY3d 143, 149 [2005]; *Bleakley*, 69 NY2d at 495), and the verdict on that crime is not against the weight of the evidence when viewed independently and in light of the elements as charged to the jury (*see generally Danielson*, 9 NY3d at 348-349; *People v Gonzalez*, 174 AD3d 1542, 1544-1545 [4th Dept 2019]). Contrary to defendant's further assertion, the conspiracy conviction cannot be against the weight of the evidence as

to the affirmative defense of renunciation because Supreme Court never submitted that affirmative defense to the jury (*see People v Simpson*, 173 AD3d 1617, 1618 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]; *People v Mahon*, 160 AD3d 563, 563 [1st Dept 2018], *lv denied* 31 NY3d 1119 [2018]).

Defendant further argues in appeal Nos. 1 and 2 that defense counsel was ineffective for failing to craft a successful motion to challenge the jury panel on the ground that it was not "selected at random from a fair cross-section of the community in [Monroe County]" (Judiciary Law § 500). To the extent reviewable on direct appeal, defendant's contention is unavailing because he has not "establish[ed] that a successful motion [on that ground] could have been made under these circumstances" (*Simpson*, 173 AD3d at 1620; *see People v Larkins*, 153 AD3d 1584, 1586 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]).

In appeal No. 3, defendant initially contends that defense counsel was ineffective for implicitly abandoning his motion for a *Cardona* hearing (*see People v Cardona*, 41 NY2d 333 [1977]) with respect to a jailhouse informant. We reject that contention. The trial testimony demonstrated that the informant relayed defendant's murder confession to the Monroe County District Attorney's office *on the informant's own accord*, without any prior involvement of or encouragement from law enforcement. The informant was therefore not a government agent when defendant confessed to murder, notwithstanding the informant's " 'self-interest in obtaining better treatment from the government' " when he first approached the District Attorney's office (*People v Newbeck*, 157 AD3d 908, 909 [2d Dept 2018], *lv denied* 31 NY3d 985 [2018]). Moreover, although defendant made additional inculpatory statements to the informant after the latter had become a government agent, those later statements were not subject to suppression under *Cardona* because they related to a new crime, i.e., conspiracy (*see People v Bongarzone*, 69 NY2d 892, 895 [1987]). Thus, because the facts and the law were unfavorable to the motion for a *Cardona* hearing, defense counsel's implicit abandonment of that motion "cannot be deemed ineffective" (*People v Pabon*, 173 AD3d 1847, 1848 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]; *see People v Bradford*, 118 AD3d 1254, 1255-1256 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]).

Defendant next contends in appeal No. 3 that defense counsel was ineffective for failing to supply the defense psychiatrist with sufficient documents about defendant's mental health history. That contention is without merit because, as the psychiatrist explained in a letter to defense counsel, any psychiatric defense was logically precluded by defendant's insistence that he had nothing to do with the murder. Thus, defense counsel was not ineffective in failing to supply the expert with further documents that, under the circumstances, would have made no difference in the case (*see People v Henderson*, 27 NY3d 509, 514 [2016]; *People v Pavone*, 26 NY3d 629, 647 [2015]; *People v Nemelc*, 161 AD3d 615, 617 [1st Dept 2018], *lv denied* 32 NY3d 939 [2018]).

Defendant finally contends in appeal No. 3 that defense counsel

failed to adequately advise him about the strength of the People's case and the benefits of a plea bargain. According to defendant's affidavit in support of his motion, he would have accepted a plea bargain with proper counseling. Defendant's characterization of his willingness to plead guilty, however, was "made solely by [him] and [was] unsupported by any other affidavit or evidence" (CPL 440.30 [4] [d]) and, given his repeated and strident refusals on the record to contemplate any plea bargaining, "there is no reasonable possibility that such allegation is true" (*id.*). The court thus properly denied defendant's motion to vacate on that ground.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

797

KA 15-01724

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHEEN W. BELL, ALSO KNOWN AS WILLIE R.,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered July 22, 2015. The judgment convicted defendant, upon a jury verdict, of conspiracy in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same memorandum as in *People v Bell* ([appeal No. 1] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

798

KA 18-01965

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHEEN BELL, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), entered August 16, 2018. The order denied defendant's motion pursuant to CPL 440.10 to vacate judgments convicting defendant of murder in the second degree and conspiracy in the second degree.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Same memorandum as in *People v Bell* ([appeal No. 1] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

800

KA 18-00281

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COURTNEY BURTON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PAUL J. CONNOLLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered December 1, 2017. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree (two counts), assault in the first degree (two counts) and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]) and one count of criminal possession of a weapon in the second degree (§ 265.03 [3]). We reject defendant's contention that the conviction of two counts of attempted murder is not supported by legally sufficient evidence that he intended to kill the victims. The evidence established, inter alia, that defendant repeatedly fired a loaded handgun at the victims at close range, striking one of the victims in the chest, back, and arm and striking another victim in the arm. Video evidence also showed that prior to the shootings, defendant confronted one of the victims inside a club. After the victim left the club, defendant also left the club and approached the victims' vehicle in the parking lot, where he appeared to re-engage in a verbal altercation with the victims before shooting repeatedly into their vehicle. Thus, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant had the requisite intent (*see People v Williams*, 154 AD3d 1290, 1291 [4th Dept 2017], *lv denied* 30 NY3d 1110 [2018]). Furthermore, viewing the evidence in light of the elements of the crime of attempted murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject

defendant's contention that the verdict on those counts is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant contends that County Court erred in refusing to suppress a parole officer's identification of him as the shooter depicted in surveillance video of the shootings on the basis that the police-arranged procedure was unduly suggestive. We agree. When the police show a noneyewitness a recording for the purpose of determining whether the noneyewitness is able to identify the perpetrator as a person with whom he or she is familiar, "[t]he only apparent risk with such a witness [is] that the police might suggest that the voice [or person depicted] on the recording [is] that of a particular acquaintance" (*People v Gambale*, 150 AD3d 1667, 1668 [4th Dept 2017] [internal quotation marks omitted]; *see People v Collins*, 60 NY2d 214, 220 [1983]).

Here, the evidence at the suppression hearing established that the shooting was captured on surveillance video and that, as part of the investigation, a police detective asked defendant's parole officer to view the surveillance video and determine if he recognized anyone depicted therein. The detective informed the parole officer that defendant was the suspected shooter, and the parole officer identified defendant as the shooter in the video. We conclude that, by contacting the parole officer and discussing defendant with him prior to showing him the video, the detective engaged in the type of unduly suggestive behavior identified in *Collins* and *Gambale* inasmuch as his comments improperly suggested to the parole officer that the person he was about to view was defendant (*see Collins*, 60 NY2d at 220; *Gambale*, 150 AD3d at 1669).

We conclude, however, that the error in admitting the parole officer's in-court identification of defendant is harmless beyond a reasonable doubt (*see People v Clyde*, 18 NY3d 145, 153-154 [2011], *cert denied* 566 US 944 [2012]; *People v Parker*, 304 AD2d 146, 158 [4th Dept 2003], *lv denied* 100 NY2d 585 [2003]). The surveillance video establishes that the shooter wore a gray hooded sweatshirt and a black baseball cap with the letter "A" on it. Other witnesses, including a police detective who had several interactions with defendant prior to the shooting and defendant's cousin, who was with defendant on the morning of the shootings and appeared with defendant in the surveillance video, identified defendant in court and in the video recording as the person who was wearing the gray hooded sweatshirt and black baseball cap with the letter "A" on the front. In addition, defendant's cousin testified that he saw defendant approach the victims' car and extend his arm toward their vehicle, that he then heard the gunshots, and that he drove defendant to defendant's residence after the shootings. The testimony of defendant's cousin was corroborated by evidence from the city's traffic camera system, which depicted the white Ford Taurus driven by defendant's cousin as it traveled from the parking lot where the victims were shot to the street where defendant lived. The police executed a search warrant at defendant's residence, where they recovered, among other things, a gray hooded sweatshirt and a black baseball cap with the letter "A" on

the front. Furthermore, after defendant was arrested, he made phone calls from the interrogation room requesting that other people go to his residence to retrieve a gray sweatshirt and a black hat with an "A" on it or, in the alternative, wash the sweatshirt in the washing machine with bleach. In recorded jailhouse telephone calls, defendant solicited others to contact the victims and promise them money if they did not identify him as the shooter. Defendant also asked others to contact his cousin to convince him to change his story to police. Under these circumstances, the proof of defendant's guilt is overwhelming and there is no reasonable possibility that the jury would have acquitted defendant were it not for the identification by defendant's parole officer (*see Clyde*, 18 NY3d at 154; *see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

We reject defendant's contention that the court erred in denying his motion to suppress statements because he was unlawfully arrested without a warrant. Prior to defendant's arrest by members of the Syracuse Police Department and parole units, two people who knew defendant positively identified him as the shooter depicted in the video recording, thereby providing probable cause for his arrest (*see generally People v Davis*, 294 AD2d 872, 873 [4th Dept 2002]). Furthermore, although defendant was on parole at the time of the arrest, the record does not support a finding that parole officers acted as a conduit for the police or that defendant was arrested for a parole violation as a pretext for taking him into custody so that police could investigate the shootings.

Even assuming, arguendo, that defendant was arrested for a parole violation prior to the issuance of a parole warrant, defendant knowingly and voluntarily waived his *Miranda* rights before speaking with the detective, and his statements were sufficiently "attenuated from the improper detention; in other words, [they were] acquired by means sufficiently distinguishable from the arrest to be purged of the illegality" (*People v Buchanan*, 136 AD3d 1293, 1294 [4th Dept 2016], *lv denied* 27 NY3d 1129 [2016] [internal quotation marks omitted]; *see also People v Bradford*, 15 NY3d 329, 333 [2010]).

We reject the further contention of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). Defendant failed to meet that burden. The alleged instances of ineffective assistance concerning defense counsel's failure to make various objections or to seek curative instructions are "based largely on [defendant's] hindsight disagreements with . . . trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies" (*People v Rogers*, 70 AD3d 1340, 1341 [4th Dept 2010], *lv denied* 14 NY3d 892 [2010], *cert denied* 562 US 969 [2010] [internal quotation marks omitted]).

Defendant failed to preserve for our review his contention that

he was deprived of a fair trial by the court's *Molineux* ruling, which permitted the People to elicit testimony that defendant was on parole at the time of the shootings and that he had prior interactions with a police detective who was a member of the Gang Violence Task Force. We decline to exercise our power to review the unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *see also Rogers*, 70 AD3d at 1340).

The sentence is not unduly harsh or severe. Finally, we have considered defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

804

CAF 19-00242

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF RYAN M.E., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHELBY S. AND RYAN S., RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR RESPONDENT-APPELLANT SHELBY S.

RAYMOND P. KOT, II, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT RYAN S.

DAVID J. PAJAK, ALDEN, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Allegany County (Moses M. Howden, A.J.), entered January 2, 2019. The order adjudged that petitioner is the father of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting petitioner's motion in its entirety and vacating the acknowledgment of paternity executed by respondents with respect to the subject child and, as modified, the order is affirmed without costs.

Memorandum: Respondent Shelby S. is the mother of the subject child, who was born out of wedlock. The mother's boyfriend, respondent Ryan S., executed an acknowledgment of paternity (AOP) with respect to the subject child shortly after her birth. The mother countersigned the AOP, certifying that the boyfriend was the "only possible father" of the subject child. As the mother later effectively conceded under oath, however, that certification was false because she had engaged in unprotected sexual intercourse with both her boyfriend and petitioner during the conception window.

Within weeks of the child's birth, petitioner commenced this proceeding pursuant to Family Court Act § 522 and sought a declaration of paternity naming him as the child's father. Petitioner then moved for genetic testing and to vacate the AOP. The mother opposed petitioner's motion and sought, in effect, to dismiss the petition. After a hearing, Family Court refused to dismiss the petition, granted petitioner's motion insofar as it sought genetic testing, and deferred that part of petitioner's motion seeking to vacate the AOP pending the outcome of the testing.

The genetic testing revealed that, to a 99.99% degree of certainty, petitioner is the subject child's biological father. No objections were filed to the authenticity or accuracy of the test results. The court therefore granted the petition and declared petitioner as the father of the subject child (*see* Family Court Act §§ 532 [a]; 542 [a]). The court denied petitioner's motion insofar as it sought to vacate the AOP, however, reasoning that it lacked the power to grant such relief. Respondents now separately appeal.

Initially, we reject respondents' contention that petitioner lacked standing to commence this proceeding because the AOP conclusively established the boyfriend as the subject child's father. It is well established that "the existence of a valid acknowledgment of paternity does *not* bar a claim of paternity by one who is not a party to it" (*Matter of Ezequiel L.-V. v Inez M.*, 161 AD3d 689, 690 [1st Dept 2018] [emphasis added]; *see Matter of Stephen N. v Amanda O.*, 140 AD3d 1223, 1224 [3d Dept 2016]; *Matter of Thomas T. v Luba R.*, 121 AD3d 800, 800 [2d Dept 2014]). Indeed, any man "alleging to be the father" may commence a paternity proceeding under Family Court Act § 522 (*Matter of Cathleen P. v Gary P.*, 63 NY2d 805, 807 [1984]). Thus, as a man alleging to be the subject child's father, petitioner had standing to commence this proceeding pursuant to section 522 (*see id.; Stephen N.*, 140 AD3d at 1224; *Matter of Tyrone G. v Fifi N.*, 189 AD2d 8, 13-14 [1st Dept 1993]). Contrary to respondents' assertions, the standing limitations applicable to a proceeding under section 516-a have no bearing on a person's standing to commence a proceeding under section 522 (*see Stephen N.*, 140 AD3d at 1224; *Matter of Marquis B. v Rason B.*, 94 AD3d 883, 883 [2d Dept 2012], *lv dismissed* 19 NY3d 991 [2012]).

Respondents further contend that the court erred in granting petitioner's motion for genetic testing without first affirmatively finding that such testing would best serve the child's interests. The law does not require such an affirmative finding as a precondition to ordering genetic testing, however. Insofar as relevant here, Family Court Act § 532 (a) provides that, upon "the motion of any party, [the court] *shall* order the mother, her child and the alleged father to submit to [genetic] tests . . . No such test shall be ordered, however, upon a written finding by the court that it is *not* in the best interests of the child *on the basis of* res judicata, equitable estoppel, or the presumption of legitimacy" (emphasis added). As the Court of Appeals explained in construing identical language in section 418 (a), the legislature made genetic testing in paternity cases "mandatory," subject to a single "limited" exception that applies only when one of three threshold barriers—res judicata, equitable estoppel, or the presumption of legitimacy—are present *and* where genetic testing would not serve the best interests of the child (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 329 [2006]). Thus, a court has no power to deny an otherwise proper demand for genetic testing on the ground that testing would not serve the child's best interests due to factors other than res judicata, equitable estoppel, or the presumption of legitimacy (*see Matter of Suffolk County Dept. of Social Servs. v James D.*, 147 AD3d 1067, 1069 [2d Dept 2017]; *Matter of Costello v*

Timothy R., 109 AD2d 933, 933 [3d Dept 1985]; *Matter of Leromain v Venduro*, 95 AD2d 80, 83 [3d Dept 1983]). Indeed, in the absence of res judicata, equitable estoppel, or the presumption of legitimacy, "the Legislature has plainly indicated its belief that the best interests of the child will, in fact, be advanced by establishing the alleged father's paternity, irrespective of the mother's wishes" (*Leromain*, 95 AD2d at 83). The legislative policy identified in *Leromain* explains why section 532 (a) requires factual findings concerning the child's best interests when a court *denies* a motion for genetic testing, but not when a court *grants* such a motion (*see generally Shondel J.*, 7 NY3d at 329).

Respondents do not contend that either res judicata or the presumption of legitimacy applies in this case, and the mother does not contend that equitable estoppel applies. The boyfriend's current assertion of equitable estoppel is improperly raised for the first time on appeal (*see Matter of Beth R. v Ronald S.*, 149 AD3d 1216, 1218 [3d Dept 2017]; *see also People v Bailey*, 32 NY3d 70, 79 [2018]). In any event, given petitioner's commencement of this proceeding within weeks of the child's birth, equitable estoppel is clearly inapplicable in this case (*see Matter of Luis V. v Laisha P.T.*, 184 AD3d 648, 649 [2d Dept 2020]; *Matter of Michael S. v Sultana R.*, 163 AD3d 464, 476 [1st Dept 2018], *lv dismissed* 35 NY3d 964 [2020]). Thus, because none of the three threshold barriers existed in this case, the court was required to grant petitioner's motion for genetic testing (*see Costello*, 109 AD2d at 933; *Leromain*, 95 AD2d at 83), and the court cannot be faulted for failing to make factual findings about the child's overall best interests that could not, as a matter of law, have altered its statutory duty to order testing.

Finally, given the continued existence of the AOP, we acknowledge respondents' concern that the order of filiation might have effectively created an impermissible three-parent arrangement for the subject child (*see generally Matter of Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 18 n 3 [2016]; *Matter of Tomeka N.H. v Jesus R.*, 183 AD3d 106, 111 [4th Dept 2020]). The court, however, had the power to vacate the AOP to address that concern (*see Michael S.*, 163 AD3d at 474; *Matter of Marshall P. v Latifah H.*, 154 AD3d 709, 710 [2d Dept 2017]), and we conclude that the AOP should be vacated in order to eliminate any question that petitioner is the child's only legal father. We therefore modify the order by granting petitioner's motion in its entirety and vacating the AOP. Respondents' remaining contentions do not require reversal or further modification of the order.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

805

CAF 19-00243

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF RYAN M.E., PETITIONER-RESPONDENT,

V ORDER

RYAN S., RESPONDENT,
AND SHELBY S., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR RESPONDENT-APPELLANT.

RAYMOND P. KOT, II, WILIAMSVILLE, FOR RESPONDENT.

DAVID J. PAJAK, ALDEN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Allegany County (Moses M. Howden, A.J.), entered January 2, 2019. The order granted petitioner visitation with the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* Family Ct Act § 1112 [a]; *Ocasio v Ocasio*, 49 AD2d 801, 801 [4th Dept 1975], *appeal dismissed* 37 NY2d 921 [1975]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

809

CA 19-01133

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

GENERATIONS BANK, FORMERLY KNOWN AS SENECA FALLS SAVINGS BANK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GLENN DONNELLY, ET AL., DEFENDANTS, AND CHA CONSULTING, INC., DEFENDANT-APPELLANT.

CHA CONSULTING, INC., ON ITS OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, THIRD-PARTY PLAINTIFF-APPELLANT,

V

GENERATIONS BANK, FORMERLY KNOWN AS SENECA FALLS SAVINGS BANK, THIRD-PARTY DEFENDANT-RESPONDENT, ET AL., THIRD-PARTY DEFENDANTS.

SHEATS & BAILEY, PLLC, LIVERPOOL (EDWARD J. SHEATS OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT.

TESTA LAW FIRM, P.C., AUBURN (DANIEL A. TESTA, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered May 6, 2019. The order, among other things, granted that part of the cross motion of plaintiff-third-party defendant seeking summary judgment against defendant-third-party plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff-third-party defendant, Generations Bank, formerly known as Seneca Falls Savings Bank (Bank), commenced a foreclosure action on a duly recorded commercial mortgage it held on real property in Oswego County. The mortgage secured a commercial line of credit note that the Bank extended to defendant-third-party defendant Glenn Donnelly. In the foreclosure action, the Bank alleged, among other things, that its mortgage had priority over a subsequent mechanic's lien filed by defendant-third-party plaintiff CHA Consulting, Inc. (CHA). CHA commenced a third-party action alleging, in relevant part, that the Bank was liable for diversion of

trust fund assets. CHA appeals from an order that, inter alia, granted in part the cross motion of the Bank seeking, among other things, an order of reference and summary judgment on its complaint; denied CHA's cross motion seeking, among other things, partial summary judgment finding that its mechanic's lien had priority over the Bank's mortgage; and dismissed the cause of action in the third-party complaint alleging diversion of trust fund assets against the Bank.

CHA contends that Supreme Court erred in concluding that the note and mortgage did not constitute, respectively, a building loan contract and building loan mortgage as defined by Lien Law § 2 and in determining, therefore, that the Bank's lien retained priority over CHA's subsequent mechanic's lien even though the Bank did not file the note. We reject that contention.

In general, "[a] valid prior recorded mortgage has priority over a subsequent mechanic's lien" (*W.L. Dev. Corp. v Trifort Realty*, 44 NY2d 489, 499 [1978]; *see* Lien Law § 13 [1]). However, "[s]ection 22 of the Lien Law requires that a building loan contract, with or without the sale of land and before or simultaneously with the recording of a building loan mortgage made pursuant to it, must be filed in the clerk's office of the county where land subject to the contract is located, along with a borrower's affidavit stating the consideration paid or to be paid for the loan, any expenses incurred or to be incurred in connection with the loan, and the net sum available for the construction project" (*Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, 21 NY3d 352, 362 [2013], *rearg denied* 21 NY3d 1047 [2013]). "Failure to comply with these filing requirements changes the ordinary priority of liens, with a properly filed mechanic's lien taking priority over the interests of the parties to the contract" (*id.*). "Thus, a construction lender must file the building loan contract in order to achieve lien priority, or, put the opposite way, the statute imposes a so-called 'subordination penalty' on a lender who does not do this" (*id.* at 362-363).

Here, as the court properly concluded, the Bank established as a matter of law that the note did not constitute a building loan contract because the Bank did not, "in consideration of the express promise of [Donnelly] to make an improvement upon [the Oswego County] real property, agree[] to make advances to or for the account of [Donnelly] to be secured by a mortgage on such real property" (Lien Law § 2 [13]). The Bank thereby also established that the mortgage did not constitute a building loan mortgage because it was not "made pursuant to a building loan contract" (§ 2 [14]). The note provided that the line of credit would be used to fund the completion of construction work on a residential housing development on real property in a different county, to pay Donnelly's preexisting debt with the Bank, and for any other purposes that Donnelly deemed appropriate, but there was no "express promise" by Donnelly to make an improvement on the Oswego County property (§ 2 [13]; *see Amsterdam Sav. Bank v Terra Domus Corp.*, 97 AD2d 41, 44 [3d Dept 1983]; *cf. Altshuler*, 21 NY3d at 363; *see also Juszak v Lily & Don Holding Corp.*, 224 AD2d 588, 589 [2d Dept 1996]). In opposition, CHA failed to raise a triable issue of fact whether the Bank should be subject to the

subordination penalty (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Finally, we have considered CHA's remaining contention and conclude that it lacks merit.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

813

CA 20-00314

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

ZENNAT AHMED HABIR, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

KARRIE WILCZAK, DEFENDANT-APPELLANT-RESPONDENT,
AND AMANDA MANGO, DEFENDANT-RESPONDENT.

LAW OFFICE OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

VANDETTE PENBERTHY LLP, BUFFALO (VINCENT T. PARLATO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 3, 2019. The order granted in part and denied in part plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when a vehicle driven by Karrie Wilczak (defendant) made a left-hand turn into the path of plaintiff's oncoming vehicle, causing a collision. Plaintiff moved for partial summary judgment on the issue of defendants' liability, and Supreme Court granted the motion with respect to defendant's negligence and denied the motion with respect to whether plaintiff had sustained a serious injury within the meaning of Insurance Law § 5102 (d). Defendant now appeals, and plaintiff cross-appeals.

Addressing first defendant's appeal, we conclude that the court erred in granting that part of plaintiff's motion with respect to defendant's negligence, and we therefore modify the order by denying the motion in its entirety. Plaintiff contends that defendant failed to yield the right-of-way to plaintiff's vehicle in violation of Vehicle and Traffic Law § 1141 and that defendant was thus negligent as a matter of law. However, it is only the *unexcused* violation of a provision in the Vehicle and Traffic Law that constitutes negligence per se (*see Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392 [4th Dept 2011]; *see also Brown v State of New York* [appeal No. 2], 144 AD3d 1535, 1538 [4th Dept 2016], *affd* 31 NY3d 514 [2018]; *Gardner v Chester*, 151 AD3d 1894, 1896 [4th Dept 2017]; *accord* NY PJI 3d 2:26,

Comment). We conclude that plaintiff failed to meet her initial burden on her motion inasmuch as her submissions raised an issue of fact whether defendant's violation of section 1141 should be excused based on evidence that plaintiff may have been driving her vehicle on the street between 2:00 a.m. and 2:30 a.m. without her headlights illuminated (*see Luck v Tellier*, 222 AD2d 783, 784-785 [3d Dept 1995]; *see also Moore v DL Peterson Trust*, 172 AD3d 1058, 1059-1060 [2d Dept 2019]). The reasonableness of defendant's excuse is for a factfinder to determine (*see Baker v Joyal*, 4 AD3d 596, 597 [3d Dept 2004], *lv denied* 2 NY3d 706 [2004]; *see also Feeley v St. Lawrence Univ.*, 13 AD3d 782, 783 [3d Dept 2004]; *Tomaselli v Goldstein*, 104 AD2d 872, 873 [2d Dept 1984]).

Addressing plaintiff's cross appeal, we conclude that the court properly determined that plaintiff is not entitled to summary judgment on the issue of serious injury. Plaintiff alleges injuries to her neck and shoulders and relies on the significant limitation of use and 90/180-day categories of serious injury. " '[W]hether a limitation of use . . . is "significant" . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part' " (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002], *rearg denied* 98 NY2d 728 [2002]). In support of her motion, plaintiff submitted no evidence of a quantitative or qualitative assessment with respect to the neck injury (*see Maurer v Colton* [appeal No. 3], 180 AD3d 1371, 1373 [4th Dept 2020]; *see generally Toure*, 98 NY2d at 353). She also failed to submit any objective evidence of an injury to her neck. Plaintiff relies on a March 2017 cervical spine MRI showing bulging in two discs, but proof of a bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Carpenter v Steadman*, 149 AD3d 1599, 1600 [4th Dept 2017]; *Downie v McDonough*, 117 AD3d 1401, 1402-1403 [4th Dept 2014], *lv denied* 24 NY3d 906 [2014]). With respect to the shoulder injury, the medical records submitted by plaintiff fail to compare plaintiff's range of motion in her shoulders to what would be considered normal (*see Houston v Geerlings*, 83 AD3d 1448, 1449-1450 [4th Dept 2011]; *cf. Hedgecock v Pedro*, 93 AD3d 1250, 1252 [4th Dept 2012]).

Moreover, even if plaintiff's submissions showed objective evidence of an injury to her neck and shoulders, plaintiff failed to meet her burden of establishing that the injuries to her neck and shoulders were significant as opposed to a minor, mild, or slight limitation of use (*see Monette v Trummer* [appeal No. 2], 96 AD3d 1547, 1548 [4th Dept 2012]; *see generally Licari v Elliott*, 57 NY2d 230, 236 [1982]). Plaintiff's submissions showed that her neck pain had resolved six or seven months after the accident and that she had regained full range of motion in her shoulders 12 months after the accident (*see generally Downie*, 117 AD3d at 1403; *Partlow v Meehan*, 155 AD2d 647, 647-648 [2d Dept 1989]). In addition, plaintiff did not miss any work and was still able to perform most of her daily

activities. For the same reason, plaintiff's evidence was insufficient to show that she "has been curtailed from performing [her] usual activities to a great extent rather than some slight curtailment" (*Licari*, 57 NY2d at 236; *see Gaddy v Eyler*, 79 NY2d 955, 958 [1992]) as is required to establish a serious injury under the 90/180-day category (*see Carpenter*, 149 AD3d at 1599-1600; *Ehlers v Byrnes*, 147 AD3d 1465, 1466 [4th Dept 2017]).

Inasmuch as plaintiff failed to meet her initial burden on the motion, there is no need to consider defendant's submissions in opposition (*see Savilo v Denner*, 170 AD3d 1570, 1570-1572 [4th Dept 2019]; *see generally Gawron v Town of Cheektowaga*, 125 AD3d 1467, 1468 [4th Dept 2015]; *Summers v Spada*, 109 AD3d 1192, 1193 [4th Dept 2013]). In any event, defendant raised a triable issue of fact by submitting an affirmation of a radiologist who opined that there was no objective evidence of a serious injury and no showing of any significant injuries (*see generally Blake v Cadet*, 175 AD3d 1199, 1199-1200 [1st Dept 2019]; *Smith v Hamasaki*, 173 AD3d 1816, 1817 [4th Dept 2019]; *Carpenter*, 149 AD3d at 1600).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

844

KA 17-00108

PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTINA MURRAY, ALSO KNOWN AS CHRISTINA MCCLARTY, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 20, 2015. The judgment convicted defendant upon a jury verdict of insurance fraud in the third degree and falsifying business records in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of insurance fraud in the third degree (Penal Law § 176.20) and falsifying business records in the first degree (§ 175.10). The case arose from an insurance claim by which defendant attempted to recover the cash value of items of personal property that were ostensibly lost in a house fire. We previously affirmed the judgment convicting defendant's spouse after a separate trial of the same crimes, arising from the same events (*People v Murray*, 185 AD3d 1507 [4th Dept 2020]).

Contrary to defendant's contention, "the proof is legally sufficient to establish that defendant attempted to wrongfully obtain property valued in excess of $3,000" (*People v Michael*, 210 AD2d 874, 874 [4th Dept 1994], *lv denied* 84 NY2d 1035 [1995]; *see* Penal Law § 176.20). The evidence established that defendant claimed $5,000 for a leather sectional on her insurance claim form; however, a receipt indicated that defendant actually bought the sectional for $1,895 in cash. Testimony further established that many of the items that defendant claimed either did not belong to her or were not in the house at the time of the fire. The testimony of defendant's landlord established that he provided the refrigerator, a gas stove, and a top-load washer and dryer, items for which he sought recovery in his own

insurance claim. Furthermore, an arson investigator testified that he investigated the cause of the fire and did not see many of the items claimed on the form, particularly a front-load washer and dryer, flat screen televisions, video game systems, a desktop computer, digital cameras, camcorders, and a leather, king-size bedroom set.

Although defendant's challenge to the legal sufficiency of the evidence otherwise is not preserved for our review because her trial order of dismissal was not " 'specifically directed' " at the errors alleged (*People v Gray*, 86 NY2d 10, 19 [1995]), " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Danielson*, 9 NY3d 342, 349-350 [2007]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), and according deference to the jury's credibility determinations (*see People v Romero*, 7 NY3d 633, 644 [2006]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that Supreme Court abused its discretion in permitting the arson investigator to testify with respect to his conclusion that the fire had been intentionally set inasmuch as the probative value of that testimony was outweighed by its potential for prejudice. We agree.

As a threshold matter, we note that the investigator's testimony that the fire had been intentionally set was irrelevant to prove any of the essential elements of the crimes charged against defendant (*see* Penal Law §§ 175.10, 176.20; *see generally People v Scarola*, 71 NY2d 769, 777 [1988]; *People v McCullough*, 117 AD3d 1415, 1416 [4th Dept 2014], *lv denied* 23 NY3d 1040 [2014]). Even assuming, arguendo, that the challenged testimony was relevant for the reason given by the court, i.e., to complete the narrative regarding the investigation, we agree with defendant that it still should have been excluded at trial. Relevant evidence may be excluded by the trial court if the probative value of the evidence is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury (*see Scarola*, 71 NY2d at 777; *People v Smith*, 126 AD3d 1528, 1529 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]).

Here, the testimony of the investigator with respect to what items he observed in the house during the investigation was relevant to establish what property was lost in the fire. Thus, the court properly allowed the investigator to testify about his years of experience, his investigatory methods, and the fact that he had to eliminate electronics as a potential cause of the fire in order to determine the fire's actual cause. That information was essential to convey that carefully observing the electronics actually present in the house was an integral part of the investigation, and thus the presence of certain electronic devices in the house was not something that he was likely to have overlooked. Further, the fact that the investigator eliminated electronics as a potential source for the fire

was highly probative because it demonstrated that the investigator thoroughly investigated the electronics in the house. However, those critical aspects of the investigator's testimony could have been discussed without referring to his ultimate conclusion that the fire had been intentionally set. In other words, "any holes or ambiguities in the narrative 'could . . . have been easily dealt with by far less prejudicial means' " (*People v Garrett*, 88 AD3d 1253, 1254 [4th Dept 2011], *lv denied* 18 NY3d 883 [2011], quoting *People v Resek*, 3 NY3d 385, 390 [2004]).

Indeed, the investigator's conclusion was highly prejudicial because it allowed the jury to speculate that defendant burned the house down with all of her possessions inside of it in order to collect the insurance money, which, if true, would be conclusive of her alleged intent to defraud. That prejudice was compounded by the limiting instructions that the court provided to the jury after opening statements. Inasmuch as the court had concluded prior to trial that the evidence in question was relevant and admissible for the purpose of completing the narrative of events, the court appropriately instructed the jury that the evidence would be received only for that limited purpose and, consistent with defendant's request, also instructed the jury that she had not been charged with arson. However, the court further instructed the jury that, "every time you hear the word arson, . . . you should be thinking about not tying the arson to [defendant]." We conclude that the further instruction, if anything, had the effect of linking defendant to the arson in the minds of the jurors. Moreover, the prejudice to defendant was also compounded by the court's failure to issue appropriate limiting instructions when the evidence in question was admitted and during the final charge to the jury (*see generally People v Presha*, 83 AD3d 1406, 1407 [4th Dept 2011]). Although defendant failed to preserve any challenge to the content or timing of the limiting instructions (*see People v Hymes*, 174 AD3d 1295, 1299-1300 [4th Dept 2019], *affd* 34 NY3d 1178 [2020]), we exercise our power to review in the interest of justice her contentions in those respects (*see* CPL 470.15 [6] [a]).

The above errors are not harmless because the evidence of defendant's guilt, without reference to the errors, is not overwhelming (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). Although we previously concluded in the spouse's appeal that the evidence of his guilt was overwhelming (*Murray*, 185 AD3d at 1508), we take judicial notice of our records in that appeal (*see People v Pierre*, 129 AD3d 1490, 1492 [4th Dept 2015]) and note that the People's case against the spouse was much stronger, in part because it involved the testimony of two neighbors establishing that the spouse had advance knowledge that the fire would be set. Likely for that reason, he did not challenge on appeal the investigator's testimony at his trial with respect to the determination that the fire was intentionally set. The evidence of arson, combined with the testimony of the neighbors, constituted overwhelming evidence of guilt against defendant's spouse (*Murray*, 185 AD3d at 1508). The People presented no such testimony here. We therefore reverse the judgment and grant a new trial.

In light of our determination, we do not reach defendant's remaining contentions.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

845

KA 18-02067

PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONI D. YANNARILLI, DEFENDANT-APPELLANT.

MARY M. WHITESIDE, NORTH HOLLYWOOD, CALIFORNIA, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered June 19, 2018. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting her, upon a plea of guilty, of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that County Court erred in denying that part of her omnibus motion seeking to dismiss the indictment on statutory speedy trial grounds (*see generally* CPL 30.30). We affirm.

"CPL 30.30 (1) (a) states that the People must be ready for trial within six months of the commencement of a criminal action, exclusive of the days chargeable to the defense" (*People v Waldron*, 6 NY3d 463, 467 [2006]). When a defendant makes a motion pursuant to CPL 30.30, he or she "bears the initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]; *see People v Goode*, 87 NY2d 1045, 1047 [1996]). If the defendant meets that burden, the People must " 'identify the exclusions on which they intend to rely' " (*Allard*, 28 NY3d at 45).

It is undisputed that the speedy trial clock began to run when the felony complaint was filed on August 23, 2015 (*see* CPL 1.20 [17]; *People v Osgood*, 52 NY2d 37, 43 [1980]), and that the People had six months from that date, or 184 days, to announce their readiness for trial (*see* CPL 30.30 [1] [a]; *People v Cooper*, 90 NY2d 292, 294 [1997]). The People's announcement of readiness did not occur until June 15, 2016, i.e., 297 days after the felony complaint was filed.

As an initial matter, we conclude that defendant met her initial

burden of establishing that the People were not ready for trial within six months of the commencement of the action, and the burden shifted to the People to establish sufficient excludable time (*see People v Berkowitz*, 50 NY2d 333, 349 [1980]; *People v Gushaw* [appeal No. 2], 112 AD2d 792, 793 [4th Dept 1985], *lv denied* 66 NY2d 919 [1985]). We further conclude, however, that the People met their burden.

Contrary to defendant's contention, the period from August 23 to August 25, 2015 is excludable inasmuch as the Allegany County Public Defender's Office first appeared on behalf of defendant on August 25, 2015, and defense counsel sent the assistant district attorney assigned to the case an email on August 26, 2015 requesting an adjournment. The time between defendant's arraignment on the felony complaint on August 23, 2015 and defense counsel's first appearance was properly excluded inasmuch as defendant was without counsel during that time period through no fault of the court (*see* CPL 30.30 [4] [f]; *People v Harrison*, 171 AD3d 1481, 1482 [4th Dept 2019]; *People v Rickard*, 71 AD3d 1420, 1420-1421 [4th Dept 2010], *lv denied* 15 NY3d 809 [2010]).

Defendant further contends that the period from August 26 to September 23, 2015 should be chargeable to the People because there was no explicit waiver of the right to a speedy trial under CPL 30.30. We reject that contention. Pursuant to the statute, "a court can exclude 'the period of delay resulting from a continuance granted by the court at the request of, or with the consent of, the defendant or his [or her] counsel' " (*People v Barden*, 27 NY3d 550, 553 [2016], quoting CPL 30.30 [4] [b]). Here, defense counsel's August 26, 2015 email to the assistant district attorney specifically requested to "adjourn it over to September," and therefore the court properly excluded that time period from the speedy trial calculation (*see People v Williams*, 41 AD3d 1252, 1254 [4th Dept 2007]). We reach the same conclusion with respect to the period from November 4, 2015 to January 6, 2016 (*see generally id.*).

We agree, however, with defendant, in part, regarding the period from May 6 to June 15, 2016. The arraignment on the indictment was scheduled for May 9, 2016, and due to defense counsel's illness, on May 6, 2016, defense counsel requested a one-week adjournment, which was granted, and the matter was adjourned to June 15, 2016 due to scheduling conflicts and "calendar congestion." In general, "the People should be charged with pre-readiness delays caused by court congestion," and that rule "is premised on the idea that such delays do not inhibit the People from declaring readiness in writing, through an off-calendar statement" (*Barden*, 27 NY3d at 556). Thus, we conclude that the one-week adjournment is chargeable to defendant because defense counsel requested it, but defense counsel's accommodation of the court's schedule was chargeable to the People (*see id.*). Consequently, we conclude that 30 days should be added to the court's calculation of 148 days that were chargeable to the People, for a total of 178 days. Nonetheless, as noted above, the statutory six-month period equated to 184 days, and therefore the People announced their readiness within the statutory time period.

We have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

846

KA 14-01895

PRESENT: WHALEN, P.J., SMITH, CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TUNG NGUYEN, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CAROLYN WALTHER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered August 5, 2014. The judgment convicted defendant upon his plea of guilty of aggravated driving while intoxicated, driving while intoxicated, aggravated unlicensed operation of a motor vehicle in the first degree, reckless endangerment in the second degree, resisting arrest and leaving the scene of a property damage incident without reporting.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, felony aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [a]; 1193 [1] [c] [ii]). Defendant contends that reversal of the judgment and vacatur of the plea are required because, before he pleaded guilty, Supreme Court failed to inform him that a fine would be imposed and failed to advise him that, following his indeterminate term of imprisonment, he would be subject to a mandatory three-year period of conditional discharge, during which he would be required to install and maintain an ignition interlock device in his vehicle (*see generally* Penal Law § 60.21; *People v Cyganik*, 154 AD3d 1336, 1337-1338 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]; *People v Panek*, 104 AD3d 1201, 1201 [4th Dept 2013], *lv denied* 21 NY3d 1018 [2013]). We agree.

"It is well settled that, in order for a plea to be knowingly, voluntarily and intelligently entered, a defendant must be advised of the direct consequences of that plea" (*People v Jones*, 118 AD3d 1360, 1361 [4th Dept 2014]; *see People v Harnett*, 16 NY3d 200, 205 [2011];

People v Catu, 4 NY3d 242, 244 [2005]). "The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine" (*Harnett*, 16 NY3d at 205), and the failure to advise a defendant at the time of his or her guilty plea of a direct consequence of that plea "requires that [the] plea be vacated" (*Catu*, 4 NY3d at 244; *see People v Jordan*, 169 AD3d 1357, 1358 [4th Dept 2019]). Here, defendant was advised of the fine and mandatory conditional discharge for the first time immediately prior to sentencing, when the prosecutor stated that defendant would be required to pay "all mandatory fines [and] surcharges" and that the period of incarceration "would be followed by a conditional discharge for the ignition interlock to be enforced." We note that preservation of defendant's contention was not required under the circumstances of this case inasmuch as "defendant did not have sufficient knowledge of the terms of the plea at the plea allocution and, when later advised, did not have sufficient opportunity to move to withdraw [his] plea" (*People v Turner*, 24 NY3d 254, 259 [2014]).

Defendant further contends that the indictment should be dismissed inasmuch as he has served his sentence. We reject that contention. While such relief may be warranted in cases "involv[ing] relatively minor crimes" (*People v Burwell*, 53 NY2d 849, 851 [1981]), the indictment here includes multiple felonies, "and for penological purposes it is relevant whether defendant committed the [charged offenses]" (*People v Allen*, 39 NY2d 916, 918 [1976]). We therefore reverse the judgment, vacate the plea, and remit the matter to Supreme Court for further proceedings on the indictment.

In light of our determination, we do not address defendant's remaining contentions.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

870

KA 17-01363

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUILLE SPENCER, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered May 17, 2017. The judgment convicted defendant upon a plea of guilty of attempted murder in the second degree, and upon a nonjury verdict of murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]) arising from an October 26, 2015 shooting, and additionally convicting him upon a plea of guilty of attempted murder in the second degree (§§ 110.00, 125.25 [1]) arising from an August 25, 2015 shooting. We affirm.

Defendant contends that his conviction of murder in the second degree and criminal possession of a weapon in the second degree is based on legally insufficient evidence because the People failed to establish his identity as the perpetrator of the October 26, 2015 shooting. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction of those crimes. The eyewitness testimony that defendant was the person who shot the deceased victim, in conjunction with other circumstantial evidence placing defendant at the scene of the shooting, is sufficient to establish defendant's identity as the perpetrator (*see People v Graham*, 174 AD3d 1486, 1490 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *People v Butler*, 140 AD3d 1610, 1610-1611 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]). We reject defendant's contention that the eyewitness testimony is incredible as a matter of law (*see People v*

Williams, 81 AD3d 1281, 1282 [4th Dept 2011], *lv denied* 16 NY3d 901 [2011]).

Furthermore, viewing the evidence in light of the elements of those crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Lostumbo*, 182 AD3d 1007, 1008 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]). Although a different verdict would not have been unreasonable, we cannot conclude that the court " 'failed to give the evidence the weight it should be accorded' " (*People v Ray*, 159 AD3d 1429, 1430 [4th Dept 2018], *lv denied* 31 NY3d 1086 [2018]; *see generally People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). Ultimately, the court was in the best position to assess, inter alia, the credibility of the witnesses who testified that defendant was the perpetrator of the shooting, and we perceive no reason to reject the court's credibility determinations (*see People v Broomfield*, 134 AD3d 1443, 1444 [4th Dept 2015], *lv denied* 27 NY3d 1129 [2016]).

Defendant failed to preserve for our review his contention that the verdict is repugnant (*see People v Alfaro*, 66 NY2d 985, 987 [1985]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Furthermore, defendant's contention that counsel was ineffective based on a conflict of interest is unpreserved because he did not move for a new trial after learning, postverdict, that his trial counsel had accepted an offer of employment with the Erie County District Attorney's Office (ECDA) and would soon start working there (*see* CPL 470.05 [2]; *People v Gaines*, 277 AD2d 900, 900-901 [4th Dept 2000]; *cf. People v Sears*, 181 AD3d 1290, 1291-1292 [4th Dept 2020]). Additionally, we note that defendant's contention "is based, in part, on matter appearing on the record and, in part, on matter outside the record and, thus, constitutes a 'mixed claim of ineffective assistance' " (*People v Alvarracin*, 148 AD3d 1041, 1042 [2d Dept 2017], *lv denied* 29 NY3d 1075 [2017]). Where, as here, "the 'claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety' " (*People v Wilson* [appeal No. 2], 162 AD3d 1591, 1592 [4th Dept 2018] [emphasis omitted]; *see generally People v Maffei*, 35 NY3d 264, 269-270 [2020]). In any event, to the extent that the record permits review of defendant's contention that he was denied effective assistance based on defense counsel's conflict of interest following his postverdict acceptance of future employment with the ECDA, we conclude that it is unavailing (*see People v McCrone*, 12 AD3d 848, 849 [3d Dept 2004], *lv denied* 4 NY3d 800 [2005]).

We reject defendant's contention that the sentence is unduly harsh and severe. We note, however, that the certificate of conviction incorrectly reflects that defendant was convicted of

attempted murder in the second degree on December 22, 2016, and it must therefore be amended to reflect that he was convicted of that count on March 27, 2017 (*see People v Jackson*, 145 AD3d 1564, 1564-1565 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

871

KA 18-02212

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVIN RAY PINKARD, SR., DEFENDANT-APPELLANT.

LINDSEY M. PIEPER, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered July 19, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that he was deprived of his constitutional right to an impartial verdict because the jurors submitted questions to County Court during the trial, and the court failed to inquire regarding potential juror misconduct, i.e., whether the jury had engaged in premature deliberations. Defendant failed to preserve his contention for our review (*see generally People v Hicks*, 6 NY3d 737, 739 [2005]; *People v Black*, 137 AD3d 1679, 1679 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016], *reconsideration denied* 28 NY3d 1026 [2016]). During the trial, the jurors told the court that they were unable to hear a question asked of a witness by the prosecutor and they asked to have that question repeated. The jurors also asked when they could submit questions. In both instances, the court responded in the manner that was requested and consented to by defense counsel, and the court gave an additional instruction to the jurors reminding them that they were not to begin deliberations prior to being charged by the court. Thus, defendant's contention is unpreserved inasmuch as defendant obtained the relief that he requested at the time of trial and made no objection to the court's responses to the jurors' questions (*see generally Hicks*, 6 NY3d at 739). We decline to exercise our power to review the unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that the verdict is against the weight of the evidence. Although an acquittal would not have been unreasonable (*see*

People v Bleakley, 69 NY2d 490, 495 [1987]), we conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see People v Williams*, 45 AD3d 905, 905-906 [3d Dept 2007], *lv denied* 10 NY3d 818 [2008]; *see generally Bleakley*, 69 NY2d at 495).

Here, two informants testified at trial regarding separate conversations that they had with defendant. During those conversations, defendant talked about killing the victim, and both informants testified that defendant had complained about his soured relationship with the victim and about no longer living in the house that he loved. Defendant told one of the informants that he "had no choice but to kill the bitch," and he told the other informant that "he just popped" and "stuck the bitch." The testimony of the informants was corroborated by the testimony of the medical examiners that there was a puncture or stab wound to the victim's neck. Although the informants had criminal histories, they were questioned about their histories on direct and cross-examination and it is well settled that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]). Furthermore, the testimony of the jailhouse informants "was not rendered incredible as a matter of law . . . by the fact that [they] had criminal histories and [one of them had] received favorable treatment in exchange for [his] testimony" (*People v Resto*, 147 AD3d 1331, 1334 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017] [internal quotation marks omitted]; *see generally People v Huff*, 133 AD3d 1223, 1226 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]).

In addition, text messages between defendant and the victim prior to her death corroborated the testimony of the informants that defendant was upset about how his relationship with the victim had deteriorated, as did the testimony and documentary evidence entered through the victim's attorney concerning, inter alia, an order of protection issued against defendant. Moreover, several of the victim's neighbors testified that they saw defendant or his red pickup truck in the vicinity of the victim's home on the day that her body was discovered at that location.

Finally, we reject defendant's contention that the court erred by summarily denying his motion for substitute counsel and failing to make a minimal inquiry into his request, thereby depriving him of effective assistance of counsel. Contrary to defendant's contention, the record establishes that the court made more than the requisite "minimal inquiry into defendant's objections before determining that there was no good cause for the substitution of counsel" (*People v Small*, 166 AD3d 1471, 1471 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019]; *see generally People v Porto*, 16 NY3d 93, 100 [2010]; *People v*

Sides, 75 NY2d 822, 825 [1990]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

876

CA 20-00406

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

JEFFREY P. MARTIN AND MICHELE R. MARTIN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WILLARD L. SEELEY, DORIS J. SEELEY AND
TODD T. SCHILLING, DEFENDANTS-APPELLANTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LILLENSTEIN & PFEIFFER, DELEVAN (RAYMOND M. PFEIFFER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered August 23, 2019. The judgment, insofar as appealed from, denied the cross motion of defendants for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a declaration adjudicating their right of first refusal with respect to a 1.9-acre parcel of land located on Hanover Road in Silver Creek (the premises). Defendants appeal from a judgment denying their cross motion for summary judgment dismissing the complaint and declaring the right of first refusal to be null and void. We affirm.

In July 2009, plaintiffs contracted to purchase from defendant Willard L. Seeley and defendant Doris J. Seeley (Seeley defendants) a home with approximately 3.5 acres of land on Hanover Road. Included in the purchase contract, an addendum to that contract, and the warranty deed conveying the property from the Seeley defendants to plaintiffs was a right of first refusal on the premises, which the Seeley defendants had retained, and which is adjacent to the property purchased by plaintiffs. As set forth in the deed, plaintiffs' right of first refusal would be triggered upon the Seeley defendants' receipt of a bona fide offer to purchase the premises, which would then require the Seeley defendants to give written notice of the offer to plaintiffs within five days of receiving the offer. Plaintiffs would then have 10 days from receipt of the notice to notify the Seeley defendants of their intent to purchase the premises on at least the same terms and conditions as the bona fide offer. In fall 2017,

the Seeley defendants received and accepted an offer from defendant Todd T. Schilling to purchase approximately 10 acres of land, including the premises. In November 2017, defendants' attorney sent written notice of Schilling's offer to plaintiffs at the mailing address listed for them on the 2009 purchase contract and deed, but not to the Hanover Road residence that plaintiffs purchased from the Seeley defendants pursuant to that contract and deed, and the United States Postal Service returned the notice as "not deliverable as addressed." The Seeley defendants sold the premises to Schilling in December 2017.

Defendants contend that the right of first refusal in the deed is void as against the rule against perpetuities as codified in EPTL 9-1.1 (b) because the right of first refusal is not personal to plaintiffs and may be exercised by their heirs and distributees more than 21 years after plaintiffs' deaths. We reject that contention. EPTL 9-1.1 (b) provides that "[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved." "EPTL 9-1.3 (b) and the common-law rule of construction which it codifies embody the unexceptionable propositions that parties who make grants of real property interests presumably intend their grants to be effective and that reviewing courts should, if at all possible, avoid constructions which frustrate their intended purposes" (*Morrison v Piper*, 77 NY2d 165, 173-174 [1990]).

Here, the deed indicates that the right of first refusal is for the benefit of plaintiffs only, and that it may only be exercised by plaintiffs personally (*cf. Martinsen v Camperlino*, 81 AD3d 256, 258 [4th Dept 2010], *lv denied* 16 NY3d 708 [2011]). The provision provides, in relevant part, "[t]his [r]ight of [f]irst [r]efusal shall run with the land and inure to and be for the benefit of the [plaintiffs] but not their successors and assigns tenants subtenants licensees mortgagees and possession [sic] and invitees." We reject defendants' contention that plaintiffs' interest could vest in their heirs and distributees more than 21 years after plaintiffs' deaths inasmuch as it would not be possible for the right to vest in plaintiffs' heirs and distributees without also necessarily vesting in their successors and assigns. We note that "[t]here is nothing in the language of the deed—if read as a whole in an effort to discover the purpose sought to be achieved (*see Matter of Carmer*, 71 NY2d 781, 785 [1988]; *Matter of Thall*, 18 NY2d 186, 192 [1966])—suggesting that the parties had the intention of creating the invalid remote interests which defendants' construction imputes to them" (*Morrison*, 77 NY2d at 174). Where, as here, no "contrary intention appears" (EPTL 9-1.3 [a]), we must presume that the parties "intended the [interest] to be valid" (EPTL 9-1.3 [b]; *see Sherman v Richmond Hose Co. No. 2*, 230 NY 462, 471 [1921]).

Defendants also contend that the right of first refusal is void for lack of consideration because the contract included plaintiffs' purchase of a house for $155,000 and contained no right of first

refusal. We reject that contention. A right of first refusal is subject to the statute of frauds, which provides that "[a] contract . . . for the sale[] of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged" (General Obligations Law § 5-703 [2]). Contrary to defendants' contention, the purchase contract provided that plaintiffs would receive a single family dwelling, several acres of land, and "the right of first refusal on the open land behind the grapes" for a purchase price of $155,000. The addendum to the purchase contract also provided that "the [c]ontract includes a [r]ight of [f]irst [r]efusal to the Purchasers of vacant land behind the grape vineyards, which are to be retained by the Sellers," and the deed conveying the dwelling, the land, and the right of first refusal expressed consideration "of One and More Dollars ($1.00 & More) lawful money of the United States paid by the Grantees."

We further conclude that defendants are not entitled to summary judgment dismissing the complaint on the ground that plaintiffs failed to exercise their right of first refusal in a timely manner (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to defendants' contention, questions of fact exist whether the Seeley defendants complied with the deed's requirement that they provide written notice to plaintiffs of any bona fide offers to purchase the premises within five days of receipt of the bona fide offer. Although defendants' attorney attempted to send written notice to plaintiffs on November 14, 2017, he sent the notice to a mailing address that was "current" for plaintiffs as of August 31, 2009, rather than to the Hanover Road residence that plaintiffs purchased from the Seeley defendants in August 2009. Consequently, the notice was returned by the post office as "not deliverable as addressed" and "unable to forward." Prior to Schilling's purchase of the premises in December 2017, Willard L. Seeley and Schilling were informed by the attorney who represented both Schilling and the Seeley defendants in the transaction that the notice sent to plaintiffs had been returned as undeliverable, and both Willard L. Seeley and Schilling testified that they knew plaintiffs were living on Hanover Road. Nonetheless, no effort was made to provide notice to plaintiffs at their current known address. Thus, plaintiffs were unaware of Schilling's offer to purchase the premises and they had no opportunity to exercise their right of first refusal. Inasmuch as a plain reading of the purchase contract, the addendum to that contract and the deed, or a simple address search by defendants' attorney, would have verified that plaintiffs had been living at the Hanover Road address since they took possession of that property from the Seeleys in 2009, we conclude that a question of fact exists whether the Seeley defendants complied with the notice requirement in the right of first refusal.

Finally, even assuming, arguendo, that it was reasonable for defendants' attorney, in November 2017, to send notice to plaintiffs' former mailing address after plaintiffs purchased a residence from the Seeley defendants in 2009, we conclude that a question of fact exists whether the written notice sent on November 14, 2017 was timely. The

deed required the Seeley defendants to provide written notice to plaintiffs within five days of receiving an offer, and according to the deposition testimony of defendant Schilling, he made a purchase offer to the Seeley defendants in October and entered into an agreement with them to purchase the premises and other property during the week of October 10-17, 2017, which was approximately one month before defendants' attorney sent notice to plaintiffs' former mailing address.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

877

CA 19-02235

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

GARY BLAJSZCZAK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MEGHAN MCGHEE-REYNOLDS, DEFENDANT-APPELLANT.

LAW OFFICE OF VICTOR M. WRIGHT, ORCHARD PARK (RACHEL A. EMMINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered November 25, 2019. The order denied defendant's motion for summary judgment dismissing the complaint and, in the alternative, for bifurcation.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained in a motor vehicle accident in which the motorcycle plaintiff was driving rear-ended a vehicle driven by defendant after defendant allegedly stopped suddenly when a dog ran into the road. Defendant moved for summary judgment dismissing the complaint on, inter alia, the ground that she was not negligent and, in the alternative, for bifurcation of the issues of negligence and damages. Supreme Court denied the motion and defendant now appeals. We affirm.

Defendant failed to establish that she was entitled to judgment as a matter of law on the issue of negligence because her own papers raised an issue of fact with respect to that issue (*see generally Niedzwiecki v Yeates*, 175 AD3d 903, 904 [4th Dept 2019]). A driver who stops suddenly has a duty to do so with "reasonable care and due regard to other[] [drivers]" and to give " 'an appropriate signal . . . to the driver of any vehicle immediately to the rear' " (PJI 2:83; *see* Vehicle and Traffic Law § 1163 [c]). Here, although defendant testified at her deposition that she was completely stopped for 10 seconds before the collision, defendant also submitted plaintiff's deposition testimony that defendant stopped so suddenly that plaintiff was unable to avoid colliding with defendant's vehicle. Further, while the accident occurred in a residential area, defendant stopped her vehicle on a road with a speed limit of 45 miles per hour, where motorists could have reasonably expected traffic to continue unimpeded (*see Tutrani v County of Suffolk*, 10 NY3d 906, 907 [2008]). Moreover, even if defendant met her initial burden of establishing

that she was not negligent, we conclude that plaintiff raised an issue of fact by submitting the expert affidavit of an experienced driving instructor who opined that the best practice for a driver confronted with a small animal in the road is to avoid stopping suddenly (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

We reject defendant's contention that, pursuant to the emergency doctrine, her actions were not negligent as a matter of law. Under the emergency doctrine, "when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes [the driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Patterson v Central N.Y. Regional Transp. Auth. [CNYRTA]*, 94 AD3d 1565, 1565 [4th Dept 2012], *lv denied* 19 NY3d 815 [2012] [internal quotation marks omitted]; *see Caristo v Sanzone*, 96 NY2d 172, 174 [2001]). Generally, it is "for the trier of fact to determine whether an emergency existed and, if so, whether the [driver's] response thereto was reasonable" (*Patterson*, 94 AD3d at 1566 [internal quotation marks omitted]). However, "summary judgment is appropriate where . . . the driver presents sufficient evidence to establish the reasonableness of his or her actions [in an emergency situation] and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact" (*id.* [internal quotation marks omitted]). Here, defendant met her initial burden of establishing that she was faced with a sudden and unforeseen emergency inasmuch as a dog ran out into the road (*see id.*), but plaintiff raised an issue of fact whether defendant's response to the situation was that of a reasonably prudent person (*see generally Heye v Smith*, 30 AD3d 991, 992-993 [4th Dept 2006]).

Finally, we conclude that the court did not abuse its discretion in denying defendant's motion with respect to bifurcation of the issues of negligence and damages. As a general rule, "[i]ssues of liability and damages in a negligence action are distinct and severable issues that should be tried and determined separately unless plaintiff's injuries have an important bearing on the issue of liability" (*Tomiuk v Oakgrove Constr., Inc.*, 52 AD3d 1275, 1275 [4th Dept 2008] [internal quotation marks omitted]), or unless bifurcation would not " 'assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action' " (*Piccione v Tri-main Dev.*, 5 AD3d 1086, 1087 [4th Dept 2004]). Here, the court did not abuse its discretion in determining that bifurcation would not assist in a clarification or simplification of the issues (*see Mazur v Mazur*, 288 AD2d 945, 945-946 [4th Dept 2001]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

879

CA 20-00217

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

GARY A. MILLER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NATIONAL PROPERTY MANAGEMENT ASSOCIATES, INC., KATHBILL PROPERTIES, LLC, DAVEBILL PROPERTIES, MARCIA DORSHEIMER, LUIS CAPUNO AND LINDA SEVERSON, DEFENDANTS-APPELLANTS.

BOND SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered July 29, 2019. The order denied in part defendants' motion to dismiss plaintiff's complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of defendants' motion seeking to dismiss the third, fourth, fifth, and eighth causes of action in their entirety, to dismiss the sixth cause of action insofar as it alleges breach of contract against defendants National Property Management Associates, Inc., KathBill Properties, LLC, Marcia Dorsheimer, Luis Capuno, and Linda Severson, and to dismiss the claim for punitive damages, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover compensatory and punitive damages for defendants' allegedly wrongful conduct in terminating his employment and evicting him from a work-provided apartment. According to the complaint, defendants National Property Management Associates, Inc., KathBill Properties, LLC, and DaveBill Properties were plaintiff's employers, and the remaining defendants were plaintiff's supervisors. Defendants now appeal from an order that, inter alia, denied certain parts of their motion to dismiss the complaint pursuant to CPLR 3211 (a) (5) and (7).

With respect to the third cause of action (unlawful retaliation under the Human Rights Law [HRL]), a person must have "engaged in protected activity" in order to recover for unlawful retaliation under the HRL (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]). A "protected activity" consists of "opposing or complaining about *unlawful discrimination*" (*id.* [emphasis added]), and "complaining of conduct other than unlawful discrimination . . . is simply not a protected activity subject to a retaliation claim under

the [HRL]" (*id.* at 313 n 11). Here, plaintiff alleges that he engaged in "protected activity" when his attorney sent a letter to one or more defendants about an altercation between plaintiff and a neighbor. We agree with defendants that, as a matter of law, sending the letter did not constitute "protected activity" because the letter did not suggest, much less allege, that anyone had engaged in "unlawful discrimination," i.e., conduct prohibited by the HRL. Rather, the letter argued only that plaintiff had not assaulted anyone. The third cause of action should therefore have been dismissed (*see id.* at 313; *Brunache v MV Transp., Inc.*, 151 AD3d 1011, 1014 [2d Dept 2017]; *Gonzalez v EVG, Inc.*, 123 AD3d 486, 487 [1st Dept 2014]).

With respect to the fourth cause of action (intentional infliction of emotional distress [IIED]), it is well established that "[t]ort causes of action alleging intentional infliction of emotional distress . . . 'cannot be allowed in circumvention of the unavailability of a tort claim for wrongful discharge or the contract rule against liability for discharge of an at-will employee' " (*Rich v CooperVision, Inc.*, 198 AD2d 860, 861 [4th Dept 1993], quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]). Here, the fourth cause of action alleges that defendants committed IIED by collectively engaging in various forms of "extreme and outrageous conduct" in order to procure the termination of plaintiff's employment. Such allegations do not state a cause of action for IIED given defendants' roles as plaintiff's employers and supervisors, and the fourth cause of action should therefore have been dismissed (*see Doyle v Doyle-Koch Agency*, 249 AD2d 357, 357 [2d Dept 1998]).

With respect to the fifth and eighth causes of action (negligent infliction of emotional distress and negligent hiring, training, and supervision, respectively), it is well established that workers' compensation benefits are the "exclusive remedy for . . . injuries allegedly caused by the negligence of [a person's] employer and fellow employee" (*O'Dette v Parton*, 190 AD2d 1074, 1075 [4th Dept 1993]; *see* Workers' Compensation Law § 29 [6]). Thus, inasmuch as defendants are plaintiff's employers and fellow employees, his causes of action against them for work-related negligence are barred by the Workers' Compensation Law's exclusivity provision, and the fifth and eighth causes of action should therefore have been dismissed (*see Thomas v Northeast Theatre Corp.*, 51 AD3d 588, 589 [1st Dept 2008]; *Martinez v Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 AD3d 274, 275 [1st Dept 2005]).

We agree with defendants that the breach of contract claim in the sixth cause of action should have been dismissed against all defendants except DaveBill Properties (DaveBill) because the lease agreement at issue was made between only plaintiff and DaveBill, and plaintiff has "failed to allege . . . that [any defendant except DaveBill] would be bound by the terms of the agreement to which it was not a party" (*Amalgamated Tr. Union Local 1181, AFL-CIO v City of New York*, 45 AD3d 788, 790 [2d Dept 2007]; *see Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2d Dept 2011]). Supreme Court, however, properly denied defendants' motion insofar as it sought to dismiss the breach of contract claim against DaveBill on the ground that plaintiff

failed to identify the portion of the lease agreement that was allegedly breached; liberally construed in plaintiff's favor, the complaint alleges that the implied warranty of habitability was breached, and defendants make no argument that such a theory fails to state a cause of action against DaveBill under these circumstances (*cf. Breytman v Olinville Realty, LLC*, 54 AD3d 703, 704 [2d Dept 2008], *lv dismissed* 12 NY3d 878 [2009]).

Contrary to defendants' further contention, the court properly denied their motion insofar as it sought to dismiss the trespass claim within the sixth cause of action on the ground that such claim is conclusively defeated by paragraph 13 of the lease. On that issue, defendants failed to rebut plaintiff's allegation, which he made in the complaint, that paragraph 13 is illegal and against public policy such that it does not constitute a defense against the trespass claim (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 92 [4th Dept 2015]). To the extent that defendants now contend that paragraph 13 of the lease is valid and enforceable, they do so improperly for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Finally, we agree with defendants that the court erred in denying their motion insofar as it sought to strike plaintiff's demand for punitive damages. Punitive damages are not available for the employment discrimination claims in the complaint (*see Curto v Zittel's Dairy Farm*, 106 AD3d 1482, 1483 [4th Dept 2013]; *Harris v Chen*, 283 AD2d 976, 976 [4th Dept 2001]). Moreover, the breach of contract claim within the sixth cause of action does not qualify for punitive damages because plaintiff does not allege that DaveBill's alleged breach of contract was " 'aimed at the public generally' " (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]). Nor does the trespass claim within the sixth cause of action qualify for punitive damages given plaintiff's failure to allege any facts that would, if true, demonstrate that the alleged "trespasser acted with actual malice involving an intentional wrongdoing, or that such conduct amounted to a wanton, willful or reckless disregard of plaintiff[']s rights" (*Matter of Svenson [Swegan]*, 133 AD3d 1279, 1280 [4th Dept 2015] [internal quotation marks omitted]).

In light of the foregoing, we modify the order accordingly.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

881

CA 20-00276

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, WINSLOW, AND BANNISTER, JJ.

VERONICA PITT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE HAGUE CORPORATION AND FLAUM MANAGEMENT COMPANY, INC., DEFENDANTS-APPELLANTS.

THE CHARTWELL LAW OFFICES, LLP, NEW YORK CITY (JARETT L. WARNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FINUCANE & HARTZELL, LLP, PITTSFORD (LEO G. FINUCANE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), dated July 5, 2019. The order granted plaintiff's motion for, inter alia, leave to serve an amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action in 2016, seeking damages for injuries that she allegedly sustained when she slipped in water that leaked from a vending machine that was located in a building owned by defendant The Hague Corporation and managed by defendant Flaum Management Company, Inc. Plaintiff was diagnosed in April 2019 with small fiber peripheral neuropathy and ongoing peripheral neuropathic pain causally related to her fall and injury and thereafter moved for, inter alia, leave to amend the complaint to assert a claim of aggravation of a preexisting condition. We reject defendants' contention that Supreme Court abused its discretion in granting that part of plaintiff's motion seeking leave to amend the complaint. Plaintiff established that reasonable cause existed for the delay in asserting a claim that the slip and fall aggravated the preexisting condition. Plaintiff was not experiencing symptoms of the preexisting condition prior to her fall and injury, she was not aware of that condition prior to receiving the diagnosis, and plaintiff sought leave to amend the complaint promptly after her diagnosis, prior to the dates set forth in the fifth amended scheduling order for the completion of discovery and expert disclosure, and before a note of issue was filed (*cf. Stewart v Dunkleman*, 128 AD3d 1338, 1340 [4th Dept 2015], *lv denied* 26 NY3d 902 [2015]; *Barrera v City of New York*, 265 AD2d 516, 518 [2d Dept 1999]).

Defendants contend that they were prejudiced by plaintiff's delay

in seeking leave to amend the complaint because plaintiff's new claim of aggravation of a preexisting condition contradicts her initial allegations regarding her injury and is contrary to the law of the case, and thus defendants must revise their defense strategy. We reject that contention. It is well settled that "[l]eave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983], quoting CPLR 3025 [b]; *see Scipio v Wal-Mart Stores E., L.P.*, 100 AD3d 1452, 1453 [4th Dept 2012]), and defendants failed to meet their burden of establishing prejudice or surprise resulting from the delay (*see generally Caceras v Zorbas*, 74 NY2d 884, 885 [1989]). Prejudice is more than "the mere exposure of the [party] to greater liability" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981], *rearg denied* 55 NY2d 901 [1981]). "[T]here must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position" (*id.*).

Although plaintiff's diagnosis that the accident aggravated a preexisting condition is new, her symptoms and complaints of pain upon which that diagnosis was based are not new. Plaintiff's verified bill of particulars, which was filed in September 2016 and included allegations of widespread pain from plaintiff's shoulders to feet, a burning sensation and discoloration in both feet, pain in all four extremities, and disturbed sleep due to pain, is not inconsistent with or contradicted by the new diagnosis. Moreover, at plaintiff's deposition in March 2018, defendants' attorney questioned plaintiff at length about, inter alia, her medical history dating back many years before the fall, her medications, her medical providers, the medical treatment she had received and her ongoing complaints of pain, and plaintiff's testimony is consistent with the allegations in the bill of particulars and is not inconsistent with her new diagnosis (*cf. Rodgers v New York City Tr. Auth.*, 109 AD3d 535, 537 [2d Dept 2013]; *Barrera*, 265 AD2d at 518).

Furthermore, there is no indication that defendants' preparation of their case was hindered by the amendment or that they were prevented from taking any measure in support of their position (*see Loomis*, 54 NY2d at 23-24), and it is well settled that an opponent's need for additional discovery or additional time to prepare a defense does not constitute prejudice sufficient to justify denial of a motion to amend the pleadings (*see Rutz v Kellum*, 144 AD2d 1017, 1018 [4th Dept 1988]; *see generally Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654-655 [1st Dept 2009]).

Finally, we reject defendants' contention that the court abused its discretion in refusing to require plaintiff to pay defendants' additional legal fees, travel costs and expert costs arising from the amended complaint (*cf. Bernas v Kepner*, 36 AD2d 58, 60 [4th Dept 1971]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

900

CA 19-02165

PRESENT: SMITH, J.P., CARNI, TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

FLEIG SERVICES INC., DOING BUSINESS AS
CNC PRODUCTIVITY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AMERICAN RECYCLING & MANUFACTURING CO., INC.,
DEFENDANT-APPELLANT.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR
DEFENDANT-APPELLANT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered April 26, 2019. The order and judgment, inter alia, awarded plaintiff money damages after a nonjury trial and awarded plaintiff costs, disbursements and attorneys' fees.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating the award of costs and disbursements and attorneys' fees and as modified the order and judgment is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: On appeal from an order and judgment entered following a nonjury trial that awarded plaintiff damages, costs and disbursements, and attorneys' fees, defendant contends that the award of costs and disbursements and attorneys' fees is excessive. In determining the proper amount of those items, a court "should consider the 'time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained' " (*Matter of HSBC Bank USA, N.A. [Vaida]*, 151 AD3d 1712, 1713 [4th Dept 2017]; *see Matter of HSBC Bank USA, N.A. [Campbell]*, 150 AD3d 1661, 1663 [4th Dept 2017]). Because Supreme Court failed to make any findings with respect to those factors, we are unable to review the court's implicit determination that the costs and disbursements and attorneys' fees are reasonable (*see HSBC Bank USA, N.A. [Vaida]*, 151 AD3d at 1713). We therefore modify the order and judgment by vacating the award of costs and disbursements and attorneys' fees, and we remit the matter to Supreme Court for a determination whether those costs and disbursements and fees are reasonable, following a hearing, if necessary (*see id.*).

We have reviewed defendant's remaining contentions and conclude that they do not warrant reversal or further modification of the order

and judgment.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

907

KA 18-00710

PRESENT: CARNI, J.P., LINDLEY, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMILIO PADILLA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 15, 2018. The judgment convicted defendant upon a jury verdict of robbery in the second degree and unlawful fleeing a police officer in a motor vehicle in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on count 5 as amended and count 7 of the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [2] [b]) and unlawful fleeing a police officer in a motor vehicle in the third degree (§ 270.25). In appeal No. 2, he appeals from a judgment convicting him upon the same jury verdict of attempted robbery in the second degree (§§ 100.00, 160.10 [2] [b]). The appeals arise from separate indictments that were joined for trial. In the course of the proceedings, count 5 of the indictment in appeal No. 1 was amended to charge robbery in the second degree and the sole count of the indictment in appeal No. 2 was amended to charge attempted robbery in the second degree.

We agree with defendant that County Court erred in denying his challenges for cause to two prospective jurors whose statements during voir dire cast serious doubt on their ability to be impartial (*see generally* CPL 270.20 [1] [b]; *People v Arnold*, 96 NY2d 358, 362-363 [2001]). During jury selection, defense counsel questioned prospective jurors as to their ability to separately consider the four incidents to which the counts of the indictments related. In particular, defense counsel questioned each juror as to whether he or she would have trouble separating the proof in the case or

understanding that the prosecution had to prove each individual incident beyond a reasonable doubt, as well as whether they could set aside any preconceived notions and consider each incident individually. Two prospective jurors indicated that they were not sure if they could consider each incident separately. Specifically, one prospective juror stated, "I don't know if I could," while a second prospective juror stated, "I'm not sure. Like I'm not sure who said it, like the timeframe like if it was one after another, another day, day, day, I don't know if I can separate it. But if it's like once, you know, a year or three years later this—maybe I would be able to separate it then." In response, defense counsel asked, "[i]f the proof you're hearing in this case was that they were separated by a short period of time, cause you to have problems separating the individual events?" The second prospective juror responded, "I think so." Defense counsel sought to clarify whether the second prospective juror would have difficulty "[j]udging each one of them individually?" and the second prospective juror stated, "[y]es." We conclude that the prospective jurors' responses raised serious doubts about their ability to render an impartial verdict (*see People v Bludson*, 97 NY2d 644, 645-646 [2001]; *People v Cobb*, 185 AD3d 1432, 1432-1433 [4th Dept 2020]; *People v Hargis*, 151 AD3d 1946, 1947 [4th Dept 2017]). In response, the court explained to the entire panel that defendant "is presumed to be innocent of each and every one of those [allegations], and the fact that there was something on one day, something on another day, you're going to decide each and every one of those on its own merits." The court also specifically asked the panel if they understood that they had "to decide each one of the cases on their—each one of the charges on their own merit." The prospective jurors remained silent. We further conclude that the prospective jurors' silence in response to the court's explanation and question did not constitute an unequivocal assurance of impartiality that would warrant denial of defendant's challenges for cause (*see Arnold*, 96 NY2d at 363-364; *Hargis*, 151 AD3d at 1947-1948). Inasmuch as defendant exercised peremptory challenges with respect to the prospective jurors and exhausted all of his peremptory challenges before the completion of jury selection, the denial of his challenges for cause constitutes reversible error (*see* CPL 270.20 [2]; *Hargis*, 151 AD3d at 1948). We therefore reverse the judgment in appeal No. 1 and grant a new trial on count 5 as amended and count 7 of the indictment, and we reverse the judgment in appeal No. 2 and grant a new trial on the indictment as amended.

Because we are granting a new trial, we address defendant's challenge to the court's suppression ruling in the interest of judicial economy and conclude that the court did not err in refusing to suppress certain tangible property recovered from the apartment of defendant's girlfriend. Specifically, we conclude that the court did not err in determining that defendant lacked standing to contest the legality of the search (*see People v Hailey*, 128 AD3d 1415, 1417 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]; *People v Pope*, 113 AD3d 1121, 1122 [4th Dept 2014], *lv denied* 23 NY3d 1041 [2014]; *cf. People v Sweat*, 159 AD3d 1423, 1424 [4th Dept 2018]). In any event, the court was also correct in concluding in the alternative that, even if defendant had standing to challenge the search of the apartment, the

search of the apartment was lawful since it was based on the voluntary and valid consent of defendant's girlfriend (*see People v Rivera*, 83 AD3d 1370, 1372 [4th Dept 2011], *lv denied* 17 NY3d 904 [2011]).

Defendant's remaining contentions are academic in light of our determination.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

908

KA 18-00712

PRESENT: CARNI, J.P., LINDLEY, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMILIO PADILLA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered March 15, 2018. The judgment convicted defendant upon a jury verdict of attempted robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on the indictment as amended.

Same memorandum as in *People v Padilla* ([appeal No. 1] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

938

CAF 19-00356

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF DAVID W. AND ELIZABETH A.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

PATRICIO W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT.

DENISE J. MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

PAUL A. NORTON, CLINTON, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered January 28, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent neglected one of the subject children and derivatively neglected the other subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: In these consolidated appeals arising from combined proceedings pursuant to Family Court Act article 10, respondent appeals in appeal No. 1 from an order that, inter alia, adjudged that he neglected one subject child and derivatively neglected a second subject child and, in appeal No. 2, he appeals from an order that, inter alia, adjudged that he derivatively neglected a third subject child. Contrary to respondent's contention in both appeals, Family Court did not err in admitting testimony concerning certain out-of-court statements made by the mother of the youngest two subject children (mother) to two caseworkers and a police officer. The statements made to the caseworkers were admitted only to complete the narrative, not for the truth of the matter asserted (*see Matter of Aliyah M. [Lynnise M.]*, 159 AD3d 1564, 1565 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]; *see generally People v Medley*, 132 AD3d 1255, 1256 [4th Dept 2015], *lv denied* 26 NY3d 1110 [2016], *reconsideration denied* 27 NY3d 967 [2016]), and the statement made to the officer was properly admitted under the excited utterance exception to the hearsay rule (*see Matter of Rebecca V. [Diomedes V.]*, 180 AD3d 413, 413-414 [1st Dept 2020]; *Matter of Kirkpatrick v Kirkpatrick*, 137 AD3d 1695, 1696 [4th Dept 2016]; *see generally People v Caviness*, 38 NY2d 227,

230-232 [1975]). The mother made the statement to the officer within minutes after respondent, who is the father of the youngest and the oldest subject children, twice rear-ended the vehicle she was driving with the vehicle he was driving, and the officer testified that the mother was visibly upset and teary-eyed at the time of the statement.

However, we agree with respondent in both appeals that the court erred in denying his motion to dismiss the petitions at the close of petitioner's case inasmuch as petitioner failed to meet its burden of establishing neglect with respect to the youngest child and derivative neglect with respect to the two other subject children. "[A] party seeking to establish neglect must show, by a preponderance of the evidence . . . , first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent . . . to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]). " 'Where a motion is made by the respondent at the close of the petitioner's case to dismiss a neglect petition, [the court] must determine whether the petitioner presented a prima facie case of neglect . . . , viewing the evidence in [the] light most favorable to the petitioner and affording it the benefit of every inference which could be reasonably drawn from the proof presented' " (*Matter of Lacey-Sophia T.-R. [Ariela (T.)W.]*, 125 AD3d 1442, 1444 [4th Dept 2015]).

Here, the court based its findings of neglect and derivative neglect on its determination that respondent rear-ended the mother's vehicle with his vehicle while the youngest child was present in his vehicle. According to the mother's testimony, she spoke to respondent before the incident, and he told her that the youngest child was with him and that he had planned to drop that child off with a caretaker. The mother did not approve of the caretaker, however, and so she called respondent's parents to enlist their assistance in having respondent return the youngest child to her. The mother further testified that, approximately 20 minutes after speaking to respondent's parents, respondent called the mother and told her to meet him in a parking lot. The mother testified that she believed the purpose of the meeting was for respondent to drop the youngest child off with her but, when the mother arrived at the parking lot, respondent refused to give her the child. Respondent remained in his vehicle during the meeting, and the mother was unable to see inside his vehicle while she was talking to him and also did not hear the child. The mother then drove out of the parking lot and respondent followed her, striking her vehicle twice with his vehicle. The mother testified that she believed the child was in respondent's vehicle at the time of the incident, and that was why she called the police, but she did not know that the child was actually present in respondent's vehicle at that time. Similarly, the police officer testified regarding the mother's excited utterance immediately following the incident, i.e., that the mother told him that the child had been in respondent's vehicle.

Viewing the evidence in the light most favorable to petitioner, we conclude that petitioner failed to establish a prima facie case of neglect based on the presence of the youngest child in respondent's vehicle when the incident occurred. Although the mother believed at the time of the incident that the child was with respondent, her testimony did not establish that the child was actually present. Indeed, she did not testify that respondent had told her that the child was with him when he asked her to meet, nor did she testify that he had told her that the purpose of the meeting was to drop the child off with her. The officer's testimony also does not establish that the child was present in respondent's vehicle at the time of the incident inasmuch as the officer merely repeated the mother's belief regarding that child's presence at the time of the incident without providing additional detail. Consequently, petitioner failed to establish that the youngest child's physical, mental, or emotional condition was actually impaired or that there was imminent danger, i.e., danger that was "near or impending, not merely possible," of the child's condition becoming impaired (*Nicholson*, 3 NY3d at 369; *see generally Matter of Jordyn WW. [Tyrell WW.]*, 176 AD3d 1348, 1349 [3d Dept 2019]; *Matter of Daphne G.*, 308 AD2d 132, 135-136 [1st Dept 2003]), and petitioner likewise failed to establish that respondent derivatively neglected the other subject children (*see Matter of Dalia G. [Frank B.]*, 128 AD3d 821, 824 [2d Dept 2015]; *see generally Matter of Raymond D.*, 45 AD3d 1415, 1416 [4th Dept 2007]). We therefore reverse the orders and dismiss the petitions.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

939

CAF 19-00359

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF ANTHONY C.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

PATRICIO W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT.

DENISE J. MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

PAUL A. NORTON, CLINTON, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered January 28, 2019 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent derivatively neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Same memorandum as in *Matter of David W. (Patricio W.)* (— AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

942

CA 20-00170

PRESENT: WHALEN, P.J., CENTRA, NEMOYER, WINSLOW, AND BANNISTER, JJ.

JACLYN SAX, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WOMEN AND CHILDREN'S HOSPITAL OF BUFFALO AND KALEIDA HEALTH, DOING BUSINESS AS WOMEN AND CHILDREN'S HOSPITAL OF BUFFALO, DEFENDANTS-RESPONDENTS.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MATTHEW T. MOSHER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (CAITLIN E. O'NEIL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered October 29, 2019. The order granted the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell on snow and ice on defendants' property. We agree with plaintiff that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint. In moving for summary judgment, defendants argued that there was a storm in progress at the time that plaintiff fell. Assuming, arguendo, that the report of defendants' expert meteorologist was sufficient to establish that there was a storm at the location where plaintiff fell (*cf. Ayers v Pioneer Cent. Sch. Dist.*, 187 AD3d 1625, 1625 [4th Dept 2020]), we conclude that defendants failed to meet their initial burden of establishing that "plaintiff's injuries [were] sustained as the result of any icy condition occurring during an ongoing storm or for a reasonable time thereafter" (*Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]; *see Schult v Pyramid Walden Co., L.P.*, 167 AD3d 1577, 1577 [4th Dept 2018]; *see generally Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1020-1021 [2016]). A property owner has no duty to remove the snow "until a reasonable time ha[s] elapsed after cessation of the storm" (*Witherspoon v Tops Mkts., LLC*, 128 AD3d 1541, 1541 [4th Dept 2015] [internal quotation marks omitted]). In support of their

motion, defendants submitted the deposition testimony of plaintiff, who testified that it had snowed the night before the accident, but that it was not snowing at the time of her fall at 10:00 a.m. on the day of the accident. Plaintiff further testified that, while the sidewalks and ramp to the staircase of defendants' building had been cleared of snow, the steps were still snow-covered.

Inasmuch as defendants failed to meet their initial burden, the burden never shifted to plaintiff to raise a triable issue of fact (*see Schult*, 167 AD3d at 1577; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

985

CA 19-01579

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

JAMES F. WEBB, SR. AND LAURIE WEBB,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

REBECCA J. SCHARF AND ROBERT SCHARF,
DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered July 31, 2019. The order denied those parts of plaintiffs' motion seeking partial summary judgment on the issue of negligence and seeking summary judgment dismissing defendants' second, fourth, seventh and eighth affirmative defenses.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking partial summary judgment on the issue of negligence and dismissal of the seventh and eighth affirmative defenses and the second affirmative defense insofar as it asserts assumption of the risk and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by James F. Webb, Sr. (plaintiff) when the vehicle that he was operating was struck by a vehicle operated by Rebecca J. Scharf (defendant) and jointly owned by defendants. At the time of the collision, plaintiff was traveling straight and defendant was turning left into a driveway. Defendant was charged with a violation of Vehicle and Traffic Law § 1128 (a) and subsequently pleaded guilty. As relevant here, defendants asserted in their answer affirmative defenses based on, inter alia, plaintiff's culpable conduct or assumption of the risk (second affirmative defense), failure to take precautions for his own safety or to mitigate damages (fourth affirmative defense), assumption of the risk (seventh affirmative defense), and being the sole proximate cause of the accident, injuries, and damages (eighth affirmative defense). Plaintiffs moved for partial summary judgment on the issue of

negligence and to dismiss the second, fourth, and sixth through eighth affirmative defenses. Plaintiffs now appeal from an order denying the motion except with respect to the sixth affirmative defense.

We agree with plaintiffs that Supreme Court erred in denying the motion with respect to the issue of negligence, and we therefore modify the order accordingly. Plaintiffs met their initial burden by establishing that defendant was negligent in violating the Vehicle and Traffic Law by turning left directly into the path of plaintiff's oncoming vehicle and that defendant's violation of the statute was unexcused (*see Peterson v Ward*, 156 AD3d 1438, 1439 [4th Dept 2017]; *Amerman v Reeves*, 148 AD3d 1632, 1633 [4th Dept 2017]; *Redd v Juarbe*, 124 AD3d 1274, 1275 [4th Dept 2015]). The minor discrepancies highlighted by defendants that are in the deposition testimony submitted on the motion are not relevant to the determination of negligence and thus are insufficient to raise an issue of fact precluding summary judgment on that issue (*see Peterson*, 156 AD3d at 1439; *see also Guadagno v Norward*, 43 AD3d 1432, 1433 [4th Dept 2007]). Contrary to defendants' assertion, "[t]o be entitled to summary judgment on the issue of liability, a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence" (*Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788, 789 [2d Dept 2019]; *see Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]; *Dunn v Covanta Niagara I, LLC* [appeal No. 1], 181 AD3d 1340, 1340 [4th Dept 2020]).

Plaintiffs further contend that the court should have granted the motion with respect to the second, fourth, seventh and eighth affirmative defenses. We reject plaintiffs' contention with respect to the fourth affirmative defense and the second affirmative defense insofar as it is based on comparative negligence inasmuch as plaintiffs' own submissions raise an issue of fact whether plaintiff met his " 'duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident' " (*Brooks v Davis*, 185 AD3d 1392, 1393 [4th Dept 2020]; *cf. Godwin v Mancuso*, 170 AD3d 1672, 1672-1673 [4th Dept 2019]). However, we agree with plaintiffs that the court erred in denying the motion with respect to the seventh affirmative defense and the second affirmative defense insofar as it is based on assumption of the risk. The doctrine of primary assumption of the risk, which encompasses activities such as athletic competition, does not apply (*see generally Custodi v Town of Amherst*, 20 NY3d 83, 87 [2012]), nor does implied assumption of the risk apply. Motorists traveling through public streets, as a general rule, do not assume the risk of other motorists negligently striking their vehicle (*see generally Perez v Navarro*, 148 AD2d 509, 509-510 [2d Dept 1989]). Furthermore, we note that, at oral argument on the motion, defendants conceded that the eighth affirmative defense based on sole proximate cause should be dismissed. Therefore, we further modify the order by granting the motion with respect to the seventh and eighth affirmative defenses and the second affirmative defense insofar as it asserts assumption of the risk.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

990

CA 20-00613

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ.

KIM LAGATTUTA-SPATARO AND CURTIS SPATARO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CORA A. SCIARRINO AND KENNETH J. SCIARRINO,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 13, 2019. The order granted plaintiffs' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part with respect to the issue of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for serious injuries allegedly sustained by Kim Lagattuta-Spataro (plaintiff) when a vehicle that she was operating was rear-ended at a red light by a vehicle operated by defendant Cora A. Sciarrino and owned by defendant Kenneth J. Sciarrino. Supreme Court granted plaintiffs' motion for summary judgment on, inter alia, the issue of serious injury with respect to the significant limitation of use, permanent consequential limitation of use, and 90/180–day categories of serious injury (*see* Insurance Law § 5102 [d]).

We reject defendants' contention that the motion should have been denied as untimely because it was made more than 120 days after the filing of the note of issue without a showing of good cause for the delay (*see generally* CPLR 3212 [a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). Such a contention is waived where the nonmovant expressly consents to the timing of the motion (*see Bennett v St. John's Home* [appeal No. 2], 128 AD3d 1428, 1428-1429 [4th Dept 2015], *affd* 26 NY3d 1033 [2015]). Here, plaintiffs submitted a reply affirmation in further support of the motion in which their attorney asserted that the parties' counsel and the court had agreed during a conference on the return date for the motion. Defendants' brief does

not refute that assertion and instead contends only that the minutes of the conference are not part of the appellate record, which, we note, defendants had the obligation to assemble (*see Fink v Al-Sar Realty Corp.*, 175 AD3d 1820, 1820 [4th Dept 2019]). We thus conclude that defendants waived their contention (*see Bennett*, 128 AD3d at 1429). Although defendants further contend that the motion was not in proper form because plaintiffs set forth legal discussion in an attorney affirmation (*see* 22 NYCRR 202.8 [c]), the court may overlook such defects (*see* CPLR 2001; *see generally Standard Fruit & S.S. Co., Div. of Castle & Cooke v Russo*, 67 AD2d 970, 970 [2d Dept 1979]).

We agree with defendants, however, that plaintiffs failed to meet their initial burden of establishing that plaintiff sustained a serious injury under the significant limitation of use and permanent consequential limitation of use categories. "[W]hether a limitation of use or function is 'significant' or 'consequential' (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795, 798 [1995]; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002], *rearg denied* 98 NY2d 728 [2002]). Here, although plaintiffs' submissions included objective evidence of serious injury in the form of medical records quantifying limited range of motion in plaintiff's spine and reporting the detection of muscle spasms (*see Carpenter v Steadman*, 149 AD3d 1599, 1600 [4th Dept 2017]), those submissions also included medical records containing contrary findings. Thus, plaintiffs' own submissions raised triable issues of fact with respect to the significant limitation of use and permanent consequential limitation of use categories of serious injury (*see generally Gawron v Town of Cheektowaga*, 125 AD3d 1467, 1468 [4th Dept 2015]).

In addition, we agree with defendants that plaintiffs failed to meet their initial burden with respect to the 90/180–day category of serious injury. Plaintiffs failed to submit any evidence that plaintiff was prevented "from performing substantially all of the material acts which constitute [her] usual and customary daily activities" within the statutory period (Insurance Law § 5102 [d]; *see Maurer v Colton*, 180 AD3d 1371, 1373 [4th Dept 2020]).

Inasmuch as plaintiffs failed to meet their initial burden with respect to the three threshold categories at issue, the court erred in granting that part of the motion on the issue of serious injury, regardless of the sufficiency of defendants' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We therefore modify the order accordingly.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

992

KA 19-01363

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRADLEY B. ORLOPP, DEFENDANT-APPELLANT.

BELLETIER LAW OFFICE, SYRACUSE (ANTHONY BELLETIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (Daniel G. Barrett, J,), dated August 22, 2018. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that County Court erred in assessing points under both risk factor 5 and risk factor 6. We reject that contention. "The assessment of points for both the age of the victim under risk factor 5 and the fact that she was asleep and therefore physically helpless under risk factor 6 did not constitute impermissible double counting" (*People v Augsbury*, 156 AD3d 1487, 1488 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018] [internal quotation marks omitted]). "A person who is asleep or unable to communicate as a result of voluntary intoxication is considered to be physically helpless" (*People v Bjork*, 105 AD3d 1258, 1260 [3d Dept 2013], *lv denied* 21 NY3d 1040 [2013], *cert denied* 571 US 1213 [2014]; *see generally* Penal Law § 130.00 [7]; *People v Edison*, 167 AD3d 769, 770-771 [2d Dept 2018], *lv denied* 33 NY3d 947 [2019]). Inasmuch as the evidence showed that the victim was asleep due to intoxication at the time defendant engaged in sexual contact with her, the People established that "the victim's physical helplessness was not the result of, or in any way connected with, her age" (*People v Caban*, 61 AD3d 834, 835 [2d Dept 2009], *lv denied* 13 NY3d 702 [2009]; *see e.g. Augsbury*, 156 AD3d at 1488; *People v Edwards*, 93 AD3d 1210, 1211 [4th Dept 2012]; *cf. People v Fisher*, 22 AD3d 358, 358-359 [1st Dept 2005]).

Defendant further contends that the court should have granted him a downward departure from his presumptive risk level because he did not have any prior sex offense convictions, the instant offense did not involve forcible compulsion, and the victim initially told the police that the sexual encounter was consensual. As a preliminary matter, we conclude that defendant's contention is not preserved for our review. Although defense counsel challenged risk factor determinations, he "never asked [the] [c]ourt to use its *discretion* to depart from the Board's recommendation. He made only legal arguments, directed at the interpretation of the Guidelines" or whether the People met a particular burden of proof (*People v Johnson*, 11 NY3d 416, 421 [2008] [emphasis added]; *cf. People v George*, 141 AD3d 1177, 1178 [4th Dept 2016]). In any event, we conclude that defendant "failed to prove, by a preponderance of the evidence, a 'mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines' " (*People v Cox*, 181 AD3d 1184, 1186 [4th Dept 2020], *lv denied* 35 NY3d 909 [2020]; *see Augsbury*, 156 AD3d at 1487-1488; *see generally People v Gillotti*, 23 NY3d 841, 861-862 [2014]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. Although "[a] sex offender facing risk level classification under SORA has a right to the effective assistance of counsel" (*People v Willingham*, 101 AD3d 979, 979 [2d Dept 2012]), we conclude that, "viewing the evidence, the law and the circumstances of this case in totality and as of the time of representation, defendant received effective assistance of counsel" (*People v Russell*, 115 AD3d 1236, 1236 [4th Dept 2014]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1025

CAF 19-02082

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF CARTER H. AND PARKER H.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SETH H., RESPONDENT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR RESPONDENT-APPELLANT.

JEFFERY G. TOMPKINS, CAMDEN, FOR PETITIONER-RESPONDENT.

CATHERINE M. SULLIVAN, BALDWINSVILLE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered October 18, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject children.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order terminating his parental rights with respect to the subject children on the ground of permanent neglect. From the time the father admitted neglect to the time of the fact-finding hearing on the petition alleging permanent neglect, which was a period of two years, the father was released from incarceration and then returned to incarceration four times. Each time he was released during those two years, he returned to incarceration within two months for violating his parole. Contrary to the father's contention, petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the father's relationship with the children, both during the times he was incarcerated and during the times he was released (*see Matter of Jamarion N. [Ernest N.]*, 181 AD3d 1200, 1201 [4th Dept 2020]; *Matter of Lennox M. [Sarah M.-S.]*, 173 AD3d 1668, 1669 [4th Dept 2019]; *Matter of Jaxon S. [Jason S.]*, 170 AD3d 1687, 1688 [4th Dept 2019]). While the father was incarcerated, petitioner's caseworkers sent him monthly letters and met with him on several occasions, they arranged for visitation with the children, they provided him with a prepaid phone card so that he could call the children twice a week, and they advised him of the services he needed when he was released from incarceration. When the father was

released, petitioner provided him with temporary housing, and the caseworkers attempted to locate him when he failed to make contact with them.

Petitioner also established that, notwithstanding its diligent efforts, the father permanently neglected the children inasmuch as he "failed substantially and continuously or repeatedly to . . . plan for the future of the child[ren] although . . . able to do so" (*Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]; *see Jamarion N.*, 181 AD3d at 1201; *Jaxon S.*, 170 AD3d at 1689). While he was incarcerated, the father called the children only a few times a month when they were placed with a relative and not at all when they were subsequently placed in foster care, which is where they had been placed for over a year at the time of the fact-finding hearing. During the times the father was released from incarceration, he made no effort to contact petitioner or comply with his court-ordered services, and he visited the children only one time. In fact, in the period of over a year when the children were in foster care, he never called the children there, never sent them letters, never sent them gifts, and never arranged for visits with them when he was released from incarceration.

The father did not request a suspended judgment and thus failed to preserve for our review his contention that Family Court should have granted one (*see Jamarion N.*, 181 AD3d at 1201-1202). In any event, the court did not abuse its discretion in terminating the father's parental rights rather than issuing a suspended judgment (*see id.* at 1202; *Lennox M.*, 173 AD3d at 1670). The father made no progress in addressing the issues that led to the removal of the children, and thus a suspended judgment was not warranted (*see Jamarion N.*, 181 AD3d at 1202).

We reject the father's contention that he was denied effective assistance of counsel. The father failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1664-1665 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019] [internal quotation marks omitted]; *see Matter of Jason B. [Gerald B.]*, 155 AD3d 1575, 1576 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]). While counsel's performance was not perfect, the record, viewed in totality, reveals that the father received meaningful representation (*see Matter of Brooke T. [Terri T.]*, 175 AD3d 1842, 1842 [4th Dept 2019]; *Matter of Kemari W. [Jessica J.]*, 153 AD3d 1667, 1668 [4th Dept 2017], *lv denied* 30 NY3d 909 [2018]; *Matter of Nicholson v Nicholson*, 140 AD3d 1689, 1690 [4th Dept 2016], *lv denied* 28 NY3d 903 [2016]).

Finally, we reject the father's contention that the court erred in denying his request for the assignment of a new attorney or, alternatively, for an adjournment for him to retain a new attorney. With respect to the father's request for assignment of new counsel, he failed to show good cause for a substitution (*see Matter of Alexander S. [David S.]*, 130 AD3d 1463, 1464 [4th Dept 2015], *appeal dismissed and lv denied* 26 NY3d 1030 [2015], *rearg denied* 26 NY3d 1132 [2016]; *Matter of Wiley v Musabyemariya*, 118 AD3d 898, 900 [2d Dept 2014], *lv*

denied 24 NY3d 907 [2014]; *see generally People v Sides*, 75 NY2d 822, 824 [1990]). His statements regarding counsel were conclusory and reflected only a delaying tactic (*see Wiley*, 118 AD3d at 900-901). With respect to the father's request for an adjournment to retain his own counsel, it is well settled that "[t]he granting of an adjournment [to obtain new counsel] is addressed to the sound discretion of the court . . . In making such a determination, the court must undertake a balanced consideration of all relevant factors" (*Matter of Sicurella v Embro*, 31 AD3d 651, 651 [2d Dept 2006], *lv denied* 7 NY3d 717 [2006]; *see generally Matter of Steven B.*, 6 NY3d 888, 889 [2006]). The father made his request on the day of the rescheduled fact-finding hearing, after having been granted two prior adjournments. Under the circumstances, the court did not abuse its discretion in denying the request for another adjournment (*see Matter of Logan R. [Manuel R.]*, 168 AD3d 946, 947 [2d Dept 2019], *lv denied* 33 NY3d 911 [2019]; *Matter of Latonia W. [Anthony W.]*, 144 AD3d 1692, 1693-1694 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1040

KA 18-02431

PRESENT: SMITH, J.P., CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY SLATTERY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered April 26, 2018. The judgment convicted defendant upon his plea of guilty of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]), defendant contends and the People correctly concede that his waiver of the right to appeal is invalid because County Court's oral colloquy conflated the right to appeal with those rights automatically forfeited by the guilty plea (*see People v Thomas*, 34 NY3d 545, 561-563 [2019], — US —, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Corron*, 180 AD3d 1330, 1331 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]).

Defendant's further contention that the court erred in failing to remedy errors or omissions in the presentence report or to conduct a hearing with respect thereto is not preserved for our review (*see* CPL 470.05 [2]). Although defense counsel brought the alleged deficiencies to the court's attention, "he failed to request any corrective action" (*People v Richardson*, 142 AD3d 1318, 1319 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]), or to seek a hearing (*see People v Russell*, 133 AD3d 1199, 1200 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). We decline to exercise our power to address the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Finally, the agreed-upon sentence is not unduly harsh or severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1049

CA 19-002243

PRESENT: SMITH, J.P., CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

HAMILTON EQUITY GROUP, LLC, AS ASSIGNEE OF
HSBC BANK USA, NATIONAL ASSOCIATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAVIER FRANCISCO LUMBREREAS, ALSO KNOWN AS
JAVIER FRANCISCO LUMBRERAS, ALSO KNOWN AS
FRANCISCO J. LUMBRERAS, DEFENDANT-APPELLANT.

FEINSTEIN & NAISHTUT, LLP, RYE BROOK (STEVEN D. FEINSTEIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MIRANDA L. SHARLETTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 3, 2019. The order, inter alia, granted plaintiff's motion for a default judgment and denied defendant's cross motion to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order that, inter alia, granted plaintiff's motion for a default judgment and denied defendant's cross motion pursuant to CPLR 3211 to dismiss the complaint based on lack of personal jurisdiction. We affirm.

CPLR 3211 (e) provides that a party may move to dismiss the complaint "[a]t any time before service of the responsive pleading is required" (*see* Siegel, NY Prac § 272 at 469 [5th ed 2011]). Here, because plaintiff effected service of the summons and complaint pursuant to CPLR 308 (4), defendant had "[30] days after service is complete" to serve a responsive pleading (CPLR 3012 [c]). We conclude that the cross motion is untimely as a matter of law because it was not served within that 30-day time frame, allowing Supreme Court to deny it on that ground alone (*see Bennett v Hucke*, 64 AD3d 529, 530 [2d Dept 2009]; *Bowes v Healy*, 40 AD3d 566, 566 [2d Dept 2007]; *Hanover Ins. Co. v Finnerty*, 225 AD2d 1054, 1055 [4th Dept 1996]). We note that an extension of time to make the cross motion was never sought by defendant nor granted by the court (*see* CPLR 2004).

To the extent defendant argues that he did not timely cross-move

to dismiss the complaint because plaintiff did not properly effect service of process, we note that the proper way for him to raise that argument is by way of a motion to vacate the default judgment based upon lack of personal jurisdiction (*see generally* CPLR 5015 [a] [4]; *Cach, LLC v Ryan*, 158 AD3d 1193, 1193 [4th Dept 2018]; *Matter of Pooler v Ark*, 156 AD3d 1428, 1429 [4th Dept 2017]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1052

CA 19-01528

PRESENT: SMITH, J.P., TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

TROY C. LEMISZKO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MOSOVICH 2014 FAMILY TRUST, DEFENDANT-RESPONDENT,
AAA CONTRACTING, LLC, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (RICHARD A. NICOTRA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (DAVID RAY ADAMS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered August 12, 2019. The order denied the motion of defendant AAA Contracting, LLC to dismiss, inter alia, plaintiff's Labor Law claims against it.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he fell from a ladder while on premises owned by defendant Mosovich 2014 Family Trust (Trust). AAA Contracting, LLC (defendant) appeals from an order that denied defendant's pre-answer motion to dismiss plaintiff's Labor Law §§ 200, 240, and 241 claims and the cross claim of the Trust insofar as it seeks contractual indemnification against defendant. We affirm.

Initially, we reject defendant's contention that Supreme Court should have granted that part of its motion seeking dismissal of plaintiff's Labor Law claims against it based on collateral estoppel (*see* CPLR 3211 [a] [5]). "Whether collateral estoppel applies is . . . a question of law turning on the identity of the issues involved and whether there was a full and fair opportunity to litigate the issue in the prior proceeding" (*Matter of Guimarales [New York City Bd. of Educ.--Roberts]*, 68 NY2d 989, 991 [1986]; *see Ryan v New York Tel. Co.*, 62 NY2d 494, 500-505 [1984]). "The party seeking to invoke collateral estoppel has the burden to show the identity of the issues, while the party trying to avoid application of the doctrine must

establish the lack of a full and fair opportunity to litigate" (*Matter of Dunn*, 24 NY3d 699, 704 [2015]; *see Medlock Crossing Shopping Ctr. Duluth, Ga. L.P. v Warren*, 175 AD3d 934, 936 [4th Dept 2019]). Here, defendant did not meet its burden of establishing that a determination in plaintiff's prior workers' compensation proceeding precludes plaintiff from recovering under the Labor Law in the instant action (*see Medlock Crossing Shopping Ctr. Duluth, Ga. L.P.*, 175 AD3d at 935). In the prior determination, the Workers' Compensation Board declined to hold defendant liable for plaintiff's injuries under Workers' Compensation Law § 56 because "there was no contract between [defendant] and [plaintiff's uninsured employer, defendant] Dean Nelipowitz" (*see generally Matter of Begor v Holmes*, 71 AD3d 244, 247 [3d Dept 2010], *lv dismissed* 15 NY3d 815 [2010], *rearg denied* 15 NY3d 910 [2010]). Contrary to defendant's contention, that discrete factual finding does not preclude plaintiff from establishing that he is a protected worker within the meaning of the Labor Law, i.e., that " 'he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent' " (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]; *cf. Lee v Jones*, 230 AD2d 435, 436 [3d Dept 1997], *lv denied* 91 NY2d 802 [1997]). Indeed, the prior determination acknowledges that plaintiff "was injured while working for Dean Nelipowitz," and therefore this is not a case where plaintiff "was a mere volunteer and thus not entitled to the protection of the Labor Law" (*Lee*, 230 AD2d at 438). The prior determination also does not preclude the possibility that the Trust, as owner of the property, contracted for the services of plaintiff's employer, either directly or through defendant as an agent. Further, defendant may be held liable under the Labor Law even if it did not hire or contract with plaintiff's employer if plaintiff establishes that defendant was a general contractor, i.e., that defendant "was responsible for coordinating and supervising the entire construction project and was invested with a concomitant power to enforce safety standards and to hire responsible contractors" (*Kulaszewski v Clinton Disposal Servs.*, 272 AD2d 855, 856 [4th Dept 2000]; *see Ajche v Park Ave. Plaza Owner, LLC*, 171 AD3d 411, 413 [1st Dept 2019]). The court therefore properly denied that part of defendant's motion seeking dismissal of plaintiff's Labor Law claims against it.

The court also properly denied that part of defendant's motion to dismiss the Trust's cross claim insofar as it seeks contractual indemnification against defendant based on the failure to state a claim or, alternatively, documentary evidence. "A motion to dismiss under CPLR 3211 (a) (7) should not be granted unless, within the four corners of the pleading, liberally construed, the pleader has failed to state a cause of action, or unless documents and other submissions establish conclusively that plaintiff has no cause of action" (*Grossman v Pharmhouse Corp.*, 234 AD2d 918, 919 [4th Dept 1996]; *see Matter of Schwaner v Collins*, 17 AD3d 1068, 1069 [4th Dept 2005]). " '[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one' " (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Here, the Trust's cross claim clearly states that it is seeking contractual indemnification from each of its codefendants (*see Biance v Columbia Washington Ventures,*

LLC, 12 AD3d 926, 928 [3d Dept 2004]). Further, "[u]nder CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88). Here, the court properly concluded that the incomplete contract submitted by defendant in support of its motion was insufficient to establish defendant's entitlement to dismissal of the cross claim against it.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1055

CA 20-00048

PRESENT: SMITH, J.P., CURRAN, TROUTMAN, AND DEJOSEPH, JJ.

JOSEPH BARONE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BAUSCH & LOMB, INC., DEFENDANT,
MORCHER GmbH AND FCI OPHTHALMICS, INC.,
DEFENDANTS-APPELLANTS.

REED SMITH LLP, NEW YORK CITY (OLIVER BEIERSDORF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE SULTZER LAW GROUP, P.C., POUGHKEEPSIE (JEREMY FRANCIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered December 9, 2019. The order, insofar as appealed from, denied the motions of defendants Morcher GmbH and FCI Ophthalmics, Inc. to dismiss the amended complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motions of defendants Morcher GmbH and FCI Ophthalmics, Inc. are granted and the amended complaint is dismissed against those defendants.

Memorandum: In this products liability action, Morcher GmbH (Morcher) and FCI Ophthalmics, Inc. (FCI) (collectively, defendants) appeal from an order insofar as it denied their respective motions to dismiss the amended complaint against them. We reverse the order insofar as appealed from.

We agree with Morcher that Supreme Court erred in denying its motion. Although the ultimate burden of proof rests with the party asserting jurisdiction, in opposition to a motion to dismiss pursuant to CPLR 3211 (a) (8), the plaintiff need only make a prima facie showing that the defendant is subject to personal jurisdiction (*see Aybar v Goodyear Tire & Rubber Co.*, 175 AD3d 1373, 1373 [2d Dept 2019]; *Halas v Dick's Sporting Goods*, 105 AD3d 1411, 1412 [4th Dept 2013]). "To determine whether a non-domiciliary may be sued in New York, we first determine whether our long-arm statute (CPLR 302) confers jurisdiction over it in light of its contacts with this State. If the defendant's relationship with New York falls within the terms of CPLR 302, we determine whether the exercise of jurisdiction comports with due process" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). Defendants do not dispute that their relationship with

New York falls within the terms of CPLR 302, and thus the only issue before us is whether due process requirements are satisfied. Due process requires that the defendant "have certain minimum contacts with [New York] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " (*International Shoe Co. v Washington*, 326 US 310, 316 [1945]). In opposing Morcher's motion, plaintiff failed to make the requisite prima facie showing here, where he seeks to extend jurisdiction over a German company that manufactures medical devices in Germany and sells them through FCI, which is an independent distributor in Massachusetts (*see J. McIntyre Mach., Ltd. v Nicastro*, 564 US 873, 887-888 [2011, Breyer, J., concurring]). Plaintiff has not shown a regular flow of Morcher's goods into New York, advertising directed at New York, the delivery of Morcher's goods into the stream of commerce with the expectation of purchase in New York, or any other facts that may arguably have established jurisdiction (*see id.* at 889-890; *cf. Darrow v Hetronic Deutschland*, 119 AD3d 1142, 1144 [3d Dept 2014]). Therefore, the court should have granted Morcher's motion and dismissed the amended complaint against it (*see Aybar*, 175 AD3d at 1373).

Further, we agree with FCI that the claims against it are expressly preempted by the Medical Device Amendments (MDA) to the Federal Food, Drug and Cosmetic Act of 1938 (21 USC § 360c *et seq.*; *see* 21 USC § 360k [a]). It is undisputed that the device in question is a class III medical device with respect to which the federal government has established requirements. Thus, we must determine whether plaintiff's "common-law claims are based upon New York requirements with respect to the device that are 'different from, or in addition to,' the federal ones, and that relate to safety and effectiveness" (*Riegel v Medtronic, Inc.*, 552 US 312, 321-322 [2008]). If so, those claims are preempted by the MDA (*see id.*). If, on the other hand, the common-law claims provide a damages remedy and are premised on a violation of the regulations of the Food and Drug Administration (FDA), they " 'parallel,' rather than add to, federal requirements" and are not preempted (*id.* at 330). Plaintiff, in effect, concedes that most of his causes of action are preempted (*see id.* at 323-324; *Mitaro v Medtronic, Inc.*, 73 AD3d 1142, 1142-1143 [2d Dept 2010]), but asserts that his failure to warn claims survive because they parallel the federal regulations. Plaintiff points to FDA regulations that require a manufacturer to report to the FDA known incidents in which their products cause serious injury or death (*see* 21 CFR 803.50 [a]; *Stengel v Medtronic Inc.*, 704 F3d 1224, 1227 [9th Cir 2013], *cert denied* 573 US 930 [2014]). Even assuming, arguendo, that the regulation applies to a distributor such as FCI, we conclude that the claims set forth in the amended complaint are not premised on any alleged failure to report incidents to the FDA, but rather on defendants' alleged failure to provide adequate warnings to plaintiff and his eye doctor. Plaintiff, however, fails to identify any federal statute or regulation that requires defendants to provide warnings to consumers or their physicians (*see Doe v Bausch & Lomb, Inc.*, 443 F Supp 3d 259, 272-273 [D Conn 2020]; *see also Webb v Mentor Worldwide LLC*, 453 F Supp 3d 550, 559-560 [ND NY 2020]). Therefore, the court should have granted FCI's motion and dismissed the amended complaint

against it (*see generally Mitaro*, 73 AD3d at 1143).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1058

KA 18-01797

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTINA SANFORD GORDON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (NIKKI KOWALSKI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 12, 2018. The judgment convicted defendant upon a plea of guilty of grand larceny in the second degree, criminal possession of a forged instrument in the second degree and scheme to defraud in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of, inter alia, grand larceny in the second degree (Penal Law § 155.40 [1]), defendant contends that she did not validly waive her right to appeal. We agree. Here, in describing the nature of defendant's right to appeal and the breadth of the waiver of that right, County Court incorrectly stated, inter alia, that defendant "can't request a higher court, an appellate court, to reverse or dismiss or overturn your plea of guilty or sentence in any way," without mention of any exception, which mischaracterized the waiver as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Jeffords*, 185 AD3d 1417, 1418 [4th Dept 2020], *lv denied* 35 NY3d 1095 [2020]). Although defendant also signed a written waiver form, " '[t]he court did not inquire of defendant whether [she] understood the written waiver or whether [she] had even read the waiver before signing it' " (*People v Sanford*, 138 AD3d 1435, 1436 [4th Dept 2016]; *see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]).

Defendant failed to preserve her further contention that any amount of restitution ordered by the court was not supported by the record inasmuch as she failed to object on that ground or request a restitution hearing (*see People v Rodriguez*, 173 AD3d 1840, 1841 [4th

Dept 2019], *lv denied* 34 NY3d 953 [2019]; *People v Butler*, 170 AD3d 1496, 1497 [4th Dept 2019]; *People v Meyer*, 156 AD3d 1421, 1421-1422 [4th Dept 2017], *lv denied* 31 NY3d 985 [2018]). In any event, the court here did not order restitution as part of its sentence. To the extent defendant seeks to challenge the civil confessions of judgment that she executed prior to sentencing, those confessions of judgment — the amount, signing, and filing of which were not part of the court's sentence — are not properly before us on this appeal from her criminal judgment of conviction.

Defendant further contends that the court erred in sentencing her as a second felony offender based on her prior federal conviction under 18 USC §§ 2 and 641 because those statutes apply to conduct that does not constitute a felony in New York. Defendant's contention is unpreserved for our review inasmuch as defendant never " 'raise[d] the issue . . . whether the statute[s] under which [she] was convicted . . . [are] the equivalent of a New York . . . felony' " at the plea colloquy or sentencing (*People v Wingfield*, 181 AD3d 1253, 1254 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], *reconsideration denied* 35 NY3d 1098 [2020]). This case does not fit within the " 'narrow exception to the preservation rule' " (*People v Nieves*, 2 NY3d 310, 315 [2004]). Moreover, because "[a] CPL 440.20 motion is the proper vehicle for raising a challenge to a sentence as 'unauthorized, illegally imposed or otherwise invalid as a matter of law' (CPL 440.20 [1]), and a determination of second felony offender status is an aspect of the sentence" (*People v Jurgins*, 26 NY3d 607, 612 [2015]; *see Wingfield*, 181 AD3d at 1254), we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Finally, defendant's contention that she was denied effective assistance of counsel based on defense counsel's failure to challenge the court's determination that she is a second felony offender does not survive defendant's guilty plea inasmuch as defendant does not contend that her plea "was infected by the allegedly ineffective assistance or that [she] entered the plea because of [her] attorney's allegedly poor performance" (*People v Bethune*, 21 AD3d 1316, 1316 [4th Dept 2005], *lv denied* 6 NY3d 752 [2005]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1061

KA 18-00437

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEAN M. PRENTICE, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered February 6, 2018. The judgment convicted defendant, upon her plea of guilty, of forgery in the second degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of three counts of forgery in the second degree (Penal Law § 170.10 [1]). Defendant's contention that her plea was not knowingly, voluntarily, and intelligently entered is unpreserved for our review because she did not move to withdraw the plea or to vacate the judgment of conviction (*see People v McDonald*, 110 AD3d 1490, 1490 [4th Dept 2013], *lv denied* 23 NY3d 1022 [2014]; *People v Davis*, 99 AD3d 1228, 1229 [4th Dept 2012], *lv denied* 20 NY3d 1010 [2012]). We further conclude that this case does not fall within the "narrow exception" to the preservation requirement (*People v Lopez*, 71 NY2d 662, 666 [1988]).

We reject defendant's contention that the sentence is unduly harsh and severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1062

KA 17-01486

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH B. BARKSDALE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNETH B. BARKSDALE, DEFENDANT-APPELLANT PRO SE.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered April 24, 2017. The judgment convicted defendant upon a jury verdict of criminal sale of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the third degree (two counts), criminal sale of a controlled substance in the fifth degree and criminal possession of a controlled substance in the seventh degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We affirm.

To the extent that defendant contends in his main brief that the evidence is legally insufficient to support the conviction, that contention is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]). Nonetheless, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " raised in his main and pro se supplemental briefs (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Danielson*, 9 NY3d 342, 349 [2007]). Here, viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "[E]ven assuming,

arguendo, that a different verdict would not have been unreasonable, it cannot be said that the jurors failed to give the evidence the weight it should be accorded" (*People v Albert*, 129 AD3d 1652, 1653 [4th Dept 2015], *lv denied* 27 NY3d 990 [2016]; *see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention in his main brief that he was denied effective assistance of counsel. Defendant's claim that defense counsel was ineffective when he did not challenge a prospective juror during jury selection is without merit because defendant " 'failed to establish that defense counsel lacked a legitimate strategy in choosing not to challenge th[e] prospective juror[]' " (*People v Carpenter*, 187 AD3d 1556, 1557 [4th Dept 2020]; *see People v Maffei*, 35 NY3d 264, 265-274 [2020]; *People v Barboni*, 21 NY3d 393, 406-407 [2013]). Defendant further claims that, as demonstrated by on-the-record disagreements between himself and defense counsel, he was denied effective assistance based on defense counsel's decisions related to calling witnesses and introducing certain evidence. We reject that claim inasmuch as defendant "failed to demonstrate that those alleged errors were not strategic in nature . . . , and mere disagreement with trial strategy is insufficient to establish that defense counsel was ineffective" (*People v Henry*, 74 AD3d 1860, 1862 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]; *see People v Cole*, 179 AD3d 1505, 1507 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]). To the extent that these claims are dependent on matters outside the record on direct appeal, "the appropriate procedure for the litigation of defendant's challenge to his counsel's performance is a CPL 440.10 motion" (*Maffei*, 35 NY3d at 266; *see People v Smith*, 145 AD3d 1628, 1630 [4th Dept 2016], *lv denied* 31 NY3d 1017 [2018]). Defendant's additional claim that defense counsel did not adequately challenge a search warrant is without merit inasmuch as "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to make a motion or argument that has little or no chance of success" (*People v Francis*, 63 AD3d 1644, 1644 [4th Dept 2009], *lv denied* 13 NY3d 835 [2009] [internal quotation marks omitted]; *see People v Caban*, 5 NY3d 143, 152 [2005]; *People v Thomas*, 176 AD3d 1639, 1641 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]). To the extent that defendant's ineffective assistance claims in his pro se supplemental brief are reviewable on the record before us, we conclude that they are without merit (*see generally Caban*, 5 NY3d at 152; *People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant also contends in his main brief that County Court erred in granting his midtrial request to proceed pro se prior to summations. We reject that contention. "A defendant in a criminal case may invoke the right to defend *pro se* provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*People v McIntyre*, 36 NY2d 10, 17 [1974]; *see People v Crespo*, 32 NY3d 176, 178 [2018], *cert denied* — US —, 140 S Ct 148 [2019]). With respect to the first prong, "[a]lthough the right to represent oneself is 'severely constricted' once a trial has

begun, an otherwise untimely motion to proceed pro se may still 'be granted in the trial court's discretion and . . . in compelling circumstances' " (*People v Hassan*, 159 AD3d 1390, 1391 [4th Dept 2018], *lv denied* 31 NY3d 1148 [2018], quoting *McIntyre*, 36 NY2d at 17; *see Crespo*, 32 NY3d at 184-185; *Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 387 [2011]).

Here, contrary to defendant's assertion, we conclude on this record that the court did not abuse its discretion in considering and granting defendant's request despite its untimeliness (*see Hassan*, 159 AD3d at 1391; *People v Dashnaw*, 116 AD3d 1222, 1231-1232 [3d Dept 2014], *lv denied* 23 NY3d 1019 [2014]). Contrary to defendant's further assertion, we conclude that defendant's request "was unequivocal and was not made simply in the alternative to seeking substitute counsel" (*People v Coffee*, 151 AD3d 1837, 1838 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]; *see People v Paulin*, 140 AD3d 985, 987 [2d Dept 2016], *lv denied* 28 NY3d 935 [2016]; *cf. People v Gillian*, 8 NY3d 85, 88 [2006]). Indeed, the record establishes that defendant's request "reflect[ed] a purposeful decision to relinquish the benefit of counsel and proceed singularly" (*Kathleen K.*, 17 NY3d at 386). Defendant also asserts that his alleged poor performance while proceeding pro se demonstrates that the court erred in granting his request to represent himself. That assertion lacks merit. "Regardless of his lack of expertise and the rashness of his choice, defendant could choose to waive counsel [where, as here, the record reflects that] he did so knowingly and voluntarily" (*People v Vivenzio*, 62 NY2d 775, 776 [1984]; *see People v Malone*, 119 AD3d 1352, 1355 [4th Dept 2014], *lv denied* 24 NY3d 1003 [2014]). It is well settled that, "even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes open" (*McIntyre*, 36 NY2d at 14 [internal quotation marks omitted]; *see Malone*, 119 AD3d at 1355).

We reject defendant's contention in his main brief that he was denied effective assistance of counsel at sentencing. The record establishes that defendant's new counsel, who did not participate in the trial, was assigned for the limited purpose of assisting defendant in challenging his predicate felon status, and defendant raises no challenge to the effectiveness of that assistance. Although defendant's new counsel indicated that he was, as a result of his limited representation, unable to make an argument with respect to the appropriate sentence, defendant, who remained pro se at the sentencing proceeding, was afforded and took advantage of the opportunity to make a statement on his own behalf seeking leniency (*see* CPL 380.50 [1]). In any event, given the nature of defendant's criminal record and the criminal conduct herein, we conclude that "no statement made by [new] counsel at sentencing 'would have had an impact on the sentence imposed' " (*People v Saladeen*, 12 AD3d 1179, 1180 [4th Dept 2004], *lv denied* 4 NY3d 767 [2005]; *see People v Agee*, 129 AD3d 1559, 1561 [4th Dept 2015]). Likewise, to the extent that defendant contends that he was denied his right to counsel at sentencing, any violation of that

right "had no adverse impact, and he is not entitled to the remedy of a remand for resentencing . . . , which would serve no useful purpose" (*People v Rohadfox*, 175 AD3d 1813, 1815 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019] [internal quotation marks omitted]; *see People v Johnson*, 20 NY3d 990, 991 [2013]; *People v Adams*, 52 AD3d 243, 243-244 [1st Dept 2008], *lv denied* 11 NY3d 829 [2008]).

Contrary to defendant's contention in his main brief, the sentence is not unduly harsh or severe. We agree with defendant and the People correctly concede, however, that the uniform sentence and commitment form should be amended to reflect that defendant was sentenced as a second felony drug offender (*see People v Ortega*, 175 AD3d 1810, 1811 [4th Dept 2019]).

Finally, we have reviewed the remaining contentions raised in defendant's pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1086

CAF 19-00841

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF KELLY A. STURNICK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE L. HOBBS, RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

SARAH L. FIFIELD, FAIRPORT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered March 27, 2019 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner sole custody of the subject child and granted petitioner leave to relocate with the subject child to North Carolina.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the determination that petitioner "should return to this community at least 3 times per year for a week each time," and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: Respondent father appeals from an order that, inter alia, granted petitioner mother's petition seeking sole custody and primary physical residence of the subject child and her second petition seeking permission for the child to relocate with her to North Carolina.

The father waived his challenge to the authority of the Court Attorney Referee to hear and determine the petitions before him (*see Matter of Wolf v Assessors of Town of Hanover*, 308 NY 416, 418-420 [1955]; *see also Matter of Cushman v Cushman*, 151 AD2d 1021, 1021 [4th Dept 1989]). "[W]here a referee [is] . . . appointed without demur and evidence [is] introduced without objection that the referee lacked authority to try the issue, [t]he respondent cannot put in his evidence and take his chance that he will win and, upon his failure, claim that the reference was illegal" (*Wolf*, 308 NY at 420 [internal quotation marks omitted]). Here, inasmuch as neither the father nor his attorney voiced any objection to having the Referee hear and determine the petitions and each signed the written stipulation indicating their agreement to permit the Referee to hear and determine the petitions, the father's challenge is waived (*see id.*). We reject the father's further contention that his consent to the Referee's

determination is invalid on the ground that he signed the stipulation before being advised of his right to counsel (*see Matter of Phelps v Hunter*, 101 AD3d 1689, 1689-1690 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]; *cf. Matter of Gale v Gale*, 87 AD3d 1011, 1012 [2d Dept 2011]; *Matter of Osmundson v Held-Cummings*, 306 AD2d 950, 950-951 [4th Dept 2003]).

The father also contends that the provisions concerning his supervised visitation are inadequate. Those provisions are expressly set forth in the decision but not the order. Where there is a discrepancy between the order and the decision, the decision controls, and we therefore deem the visitation provisions included in the order (*see Matter of Lomanto v Schneider*, 78 AD3d 1536, 1536 [4th Dept 2010]; *Matter of Edward V.*, 204 AD2d 1060, 1061 [4th Dept 1994]). We agree with the father, however, that the supervised visitation provisions are inadequate. The Referee determined that the mother "should return to this community at least 3 times per year for a week each time. Those trips could be Fall, Spring and Summer of each year. That would allow [the] Father contact roughly every 4 months." The Referee failed to address details such as whether visitation with the father was for the entire week or, if not, the number and duration of visits during each week; who would constitute an appropriate supervisor for the visitation; whether the father could have overnight visitation with the child in the presence of a supervisor; and how much notice the mother would be required to give the father before she returned to the community. We therefore modify the order, as conformed to the decision, by vacating the determination that the mother "should return to this community at least 3 times per year for a week each time," and we remit the matter to Family Court to fashion an appropriate schedule for supervised visitation in accordance with the best interests of the child (*see Matter of Edmonds v Lewis*, 175 AD3d 1040, 1043 [4th Dept 2019], *lv denied* 34 NY3d 909 [2020]; *Matter of Lakeya P. v Ajja M.*, 169 AD3d 1409, 1411 [4th Dept 2019], *lv denied* 33 NY3d 906 [2019]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1102

KA 19-00379

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAIME CORDON, ALSO KNOWN AS JAMIE CORDON,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. KULESUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 4, 2019. The judgment convicted defendant upon his plea of guilty of burglary in the second degree, attempted burglary in the second degree, burglary in the third degree and criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences shall run concurrently with respect to each other, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), attempted burglary in the second degree (§§ 110.00, 140.25 [2]), burglary in the third degree (§ 140.20), and criminal possession of stolen property in the fourth degree (§ 165.45 [2]), defendant contends, and the People correctly concede, that his waiver of the right to appeal is invalid because Supreme Court "mischaracterized it as an 'absolute bar' to the taking of an appeal" (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We reiterate that the better practice is for the court "to use the Model Colloquy, which 'neatly synthesizes . . . the governing principles' " (*id.*; *see* NY Model Colloquies, Waiver of Right to Appeal).

We agree with defendant, however, that the imposition of consecutive sentences with respect to each count renders the sentence unduly harsh and severe considering, inter alia, defendant's opiate addiction resulting from injuries he sustained while serving in the

United States Army, his struggles with mental illness, and his acceptance of responsibility and show of remorse. Under the circumstances, we therefore modify the judgment as a matter of discretion in the interest of justice by directing that the sentences shall run concurrently with respect to each other (*see* CPL 470.15 [6] [b]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1128

KA 18-01566

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY EDWARDS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (DANIEL GROSS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered November 10, 2016. The judgment convicted defendant upon a jury verdict of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). Defendant contends that County Court committed *O'Rama* violations that constituted mode of proceedings errors when it failed to give defense counsel an opportunity for input before answering a note from the jury and when it delegated to a court deputy the responsibility of answering the jury's question (*see People v O'Rama*, 78 NY2d 270, 277-278 [1991]). We reject that contention. " '[T]he *O'Rama* procedure is not implicated when the jury's request is ministerial in nature and therefore requires only a ministerial response' " (*People v Nealon*, 26 NY3d 152, 161 [2015]; *see People v Williams*, 142 AD3d 1360, 1362 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016]; *People v Lewis*, 140 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Here, "the only reasonable interpretation of the [portion of the] note in question" (*People v Mitchell*, 46 AD3d 480, 480 [1st Dept 2007], *lv denied* 10 NY3d 842 [2008]) is that the jury's request referred to a transcript that was provided as an aid to the jurors when they listened during the trial to the recorded police interview of defendant, but the transcript was not admitted in evidence. It was not a substantive inquiry by the jury (*see Williams*, 142 AD3d at 1362; *People v Ziegler*, 78 AD3d 545, 546 [1st Dept 2010], *lv denied* 16 NY3d 838 [2011]), and there was no error by the court in delegating to a court deputy the responsibility of notifying the jury that the item they were seeking was not an admitted exhibit and could not be provided to them (*see People v*

Miller, 8 AD3d 176, 177 [1st Dept 2004], *mod on other grounds* 6 NY3d 295 [2006]).

Contrary to defendant's further contention concerning the validity of two search warrants, he did not make the necessary showing that "a false statement knowingly and intentionally, or with reckless disregard of the truth, was included by the affiant in the [search] warrant affidavit[s], and . . . [that such] statement [was] necessary to the finding of probable cause" (*People v Navarro*, 158 AD3d 1242, 1243 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018] [internal quotation marks omitted]). The court therefore did not err in refusing to hold a *Franks/Alfinito* hearing (*see Franks v Delaware*, 438 US 154 [1978]; *People v Alfinito*, 16 NY2d 181 [1965]) or in refusing to suppress the evidence in question.

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's contention that the evidence is legally insufficient (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Additionally, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1129

KA 18-02405

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARVIN JOHNSON, JR., DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered October 16, 2018. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a weapon in the second degree and reckless endangerment in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Initially, we agree with defendant that his purported waiver of the right to appeal is invalid. During the plea colloquy, County Court " 'conflated the right to appeal with those rights automatically forfeited by the guilty plea' " (*People v Chambers*, 176 AD3d 1600, 1600 [4th Dept 2019], *lv denied* 34 NY3d 1076 [2019]; *see People v Mothersell*, 167 AD3d 1580, 1581 [4th Dept 2018]) and, thus, the record does not establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]). Moreover, the court's sole explanation that the waiver would foreclose any review by a higher court "utterly 'mischaracterized the nature of the right [to appeal that] . . . defendant was being asked to cede' " (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Youngs*, 183 AD3d 1228, 1229 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020]). Although the purported waiver of the right to appeal is not enforceable and thus does not preclude our review of defendant's challenge to the severity of his sentence, we nevertheless conclude that the sentence is not unduly harsh or

severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1136

CAF 20-00880

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF LACEY JO FERGUSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS JOSEPH LECLAIR AND EMILY ROSE WHIPPLE,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

NICHOLAS JOSEPH LECLAIR, RESPONDENT-APPELLANT PRO SE.

EMILY ROSE WHIPPLE, RESPONDENT-APPELLANT PRO SE.

ROSE T. PLACE, GLENS FALLS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Warren County (Jeffrey D. Wait, A.J.), entered June 7, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, found respondents in contempt of court.

It is hereby ORDERED that said appeal insofar as taken by respondent Emily Rose Whipple is unanimously dismissed and the order is affirmed without costs.

Memorandum: In appeal No. 1, respondent father and respondent mother appeal from an order that, among other things, found them in contempt of court for violating a prior order of custody and visitation that, inter alia, awarded petitioner grandmother visitation with the subject children. In appeal No. 2, the father and the mother appeal from an order that, inter alia, dismissed the father's petition to modify the prior order by terminating the grandmother's visitation with the children. Because the mother did not appear at the hearing, she was in default and therefore the appeals to the extent that they are taken by her must be dismissed (*see Matter of Whelan v Baron*, 165 AD3d 1524, 1524 [3d Dept 2018]; *Matter of Roache v Hughes-Roache*, 153 AD3d 1653, 1653 [4th Dept 2017]). Relatedly, we reject the father's contention in both appeals that Family Court abused its discretion by precluding the mother from testifying by telephone. Remote testimony is specifically authorized only in certain Family Court proceedings (*see e.g.* Family Ct Act §§ 433 [c]; 531-a), and the proceedings here are not among them. Although a court has the inherent authority to grant permission to testify remotely (*see People v Wrotten*, 14 NY3d 33, 36 [2009], *cert denied* 560 US 959 [2010]; *see also* Judiciary Law § 2-b [3]), here, the court did not abuse its discretion in refusing

such permission inasmuch as no excuse was offered for the mother's absence (*see Matter of Ian G. [Simon G.]*, 180 AD3d 474, 475 [1st Dept 2020], *lv denied* 35 NY3d 910, 911 [2020]) and the court specifically noted that it would be difficult to assess her credibility if she testified in that manner (*see Matter of Neamiah Harry-Ray M. [Donna Marie M.]*, 127 AD3d 409, 410 [1st Dept 2015]).

Contrary to the father's further contention in appeal No. 1, the grandmother established by clear and convincing evidence that " 'a lawful court order clearly expressing an unequivocal mandate was in effect, that [the father] . . . had actual knowledge of its terms, and that the violation . . . defeated, impaired, impeded, or prejudiced the rights of [the grandmother]' " (*Matter of Howell v Lovell*, 103 AD3d 1229, 1230 [4th Dept 2013]; *see Matter of Beesmer v Amato*, 162 AD3d 1260, 1261-1262 [3d Dept 2018]). Indeed, the father's testimony alone established that he repeatedly withheld visitation from the grandmother without good cause. In light of that evidence, we reject the father's challenge in appeal No. 1 to the severity of his sentence (*see Matter of Rodriguez v Delacruz-Swan*, 100 AD3d 1286, 1288 [3d Dept 2012]). We have reviewed the father's remaining contentions in each appeal and conclude that they do not require reversal or modification of either order.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1137

CAF 20-00881

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF NICHOLAS JOSEPH LECLAIR,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LACEY JO FERGUSON, RESPONDENT-RESPONDENT, AND
EMILY ROSE WHIPPLE, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

NICHOLAS JOSEPH LECLAIR, PETITIONER-APPELLANT PRO SE.

EMILY ROSE WHIPPLE, RESPONDENT-APPELLANT PRO SE.

ROSE T. PLACE, GLENS FALLS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Warren County (Jeffrey D. Wait, A.J.), entered June 7, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petition to modify a prior order of visitation.

It is hereby ORDERED that said appeal insofar as taken by respondent Emily Rose Whipple is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Matter of Ferguson v LeClair* ([appeal No. 1] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1152

KA 18-00914

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEODIS HILL, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAIXI XU OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), rendered January 17, 2018. The judgment convicted defendant upon his plea of guilty of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In appeal Nos. 1 and 2, defendant appeals from two judgments, each convicting him upon his plea of guilty during a single plea proceeding of assault in the second degree (Penal Law § 120.05 [2]). Even assuming, arguendo, that defendant's waiver of the right to appeal was invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus does not preclude our review of his challenge to the severity of his sentences (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we conclude in each appeal that the sentence is not unduly harsh or severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1153

KA 18-00915

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEODIS HILL, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAIXI XU OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), rendered January 17, 2018. The judgment convicted defendant upon his plea of guilty of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same memorandum as in *People v Hill* ([appeal No. 1] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1157

KA 18-01451

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM REED, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), entered July 9, 2018. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant upon a jury verdict of robbery in the first degree (two counts).

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Onondaga County, for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals, by permission of this Court, from an order that denied without a hearing his CPL 440.10 motion to vacate the judgment convicting him following a jury trial of two counts of robbery in the first degree (Penal Law § 160.15 [3], [4]). We affirmed the judgment of conviction on direct appeal (*People v Reed*, 151 AD3d 1821 [4th Dept 2017], *lv denied* 30 NY3d 952 [2017]), concluding, inter alia, that Supreme Court properly denied without a hearing defendant's motion to dismiss the indictment on statutory speedy trial grounds because "defendant alleged only that six months had passed after the action was commenced, without stating whether the People had announced their readiness for trial" and thus failed to meet his initial burden on that motion of alleging " 'that the prosecution failed to declare readiness within the statutorily prescribed time period' " (*id.* at 1821, quoting *People v Goode*, 87 NY2d 1045, 1047 [1996]).

Defendant thereafter brought this CPL 440.10 motion to vacate the judgment of conviction on the ground that defense counsel was ineffective in failing to make a sufficient motion to dismiss the indictment based on the alleged violation of defendant's statutory right to a speedy trial (*see* CPL 30.30 [1] [a]). We conclude that the court erred in denying defendant's CPL 440.10 motion without a hearing

with respect to whether a properly pleaded CPL 30.30 motion would have been successful and whether defense counsel's failure in this regard deprived defendant of meaningful representation (*see generally Reed*, 151 AD3d at 1821-1822).

Where, as here, a defendant is charged with a felony offense, the People must announce readiness for trial within six months of the commencement of the action (*see* CPL 30.30 [1] [a]; *People v Cortes*, 80 NY2d 201, 207 n 3 [1992], *rearg denied* 81 NY2d 1068 [1993]), "exclusive of the days chargeable to the defense" (*People v Waldron*, 6 NY3d 463, 467 [2006]). In support of his CPL 440.10 motion, defendant submitted documents establishing that 88 days passed between the commencement of the action and the People's statement of readiness and that 98 additional days were chargeable to the People. Defendant thus sufficiently alleged that the People had indeed failed to timely announce their readiness for trial and that he therefore had a viable basis for a speedy trial motion. Inasmuch as "a failure of counsel to assert a meritorious speedy trial claim is, by itself, a sufficiently egregious error to render a defendant's representation ineffective" (*People v Sweet*, 79 AD3d 1772, 1772 [4th Dept 2010] [internal quotation marks omitted]; *see People v Obert*, 1 AD3d 631, 632 [3d Dept 2003], *lv denied* 2 NY3d 764 [2004]), and inasmuch as a defendant may be deprived of effective assistance even where defense counsel makes a speedy trial motion but does so in a form or at a time that is improper (*see People v Stewart*, 171 AD3d 625, 625-626 [1st Dept 2019], *lv denied* 34 NY3d 984 [2019]), we conclude that defendant asserted a viable legal basis for his CPL 440.10 motion (*see People v Mirabella*, 187 AD3d 1589, 1590 [4th Dept 2020], *lv dismissed* 36 NY3d 930 [2020]).

In opposition to defendant's CPL 440.10 motion, the People contended that the speedy trial motion would have been denied even if properly pleaded because defendant was attempting to avoid apprehension and thus the 88 days preceding the People's first statement of readiness were excludable pursuant to CPL 30.30 (4) (c) (i). In denying the CPL 440.10 motion without a hearing, the court concluded that the trial court had ruled that the 88 days between the commencement of the action and the People's initial statement of readiness "was not chargeable to the People[] because defendant evaded arrest." We note, however, that the only evidence in the record supporting the conclusion that defendant was evading arrest was the prosecutor's statement at defendant's arraignment on the indictment that she understood that defendant had "fled the area" and was heading to the New York City area, an assertion that was based solely on the supposition of an unnamed member of the police department's central investigation division. We thus conclude that defendant's submissions "support[] his contention that he was denied effective assistance of counsel . . . and raise[] a factual issue that requires a hearing" (*People v Scott*, 181 AD3d 1220, 1222 [4th Dept 2020] [internal quotation marks omitted]) and that "[t]he People submitted nothing in opposition to the motion that would require or indeed allow the court to deny the motion without a hearing" (*People v Parsons*, 114 AD3d 1154, 1154 [4th Dept 2014]; *see* CPL 440.30 [2], [4], [5]; *see generally People v Jones*, 24 NY3d 623, 636 [2014]). We therefore

reverse the order and remit the matter to Supreme Court for a hearing on defendant's motion (*see Mirabella*, 187 AD3d at 1590; *Scott*, 181 AD3d at 1222).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1167

CA 19-01897

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

DEBRA VELEY, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA A. MANCHESTER,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

LILLENSTEIN & PFEIFFER, DELEVAN (RAYMOND M. PFEIFFER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

THOMAS C. PARES, BUFFALO (JAMES P. RENDA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 20, 2019. The judgment, among other things, awarded plaintiff the sum of $73,063.44.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same memorandum as in *Veley v Manchester* ([appeal No. 2] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1168

CA 19-02030

PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

DEBRA VELEY, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

PATRICIA A. MANCHESTER,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

LILLENSTEIN & PFEIFFER, DELEVAN (RAYMOND M. PFEIFFER OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

THOMAS C. PARES, BUFFALO (JAMES P. RENDA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an amended judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), entered October 21, 2019. The amended judgment, among other things, awarded plaintiff the sum of $78,954.82.

It is hereby ORDERED that the amended judgment so appealed from is unanimously modified on the law by denying plaintiff's motion for a directed verdict, vacating the second through fifth decretal paragraphs, and granting a new trial, and as modified the amended judgment is affirmed without costs.

Memorandum: In May 2010, Ronald Manchester (decedent) converted a Summit Federal Credit Union account into a Totten trust. Decedent's wife (defendant) and his daughter (plaintiff) were listed as beneficiaries on the conversion documents. Following decedent's death, defendant transferred the trust funds to her own account, and plaintiff thereafter commenced the instant action to recover those funds. At trial, after the close of plaintiff's proof, Supreme Court granted plaintiff's motion for a directed verdict. In appeal No. 1, plaintiff appeals and defendant cross-appeals from a judgment that, inter alia, awarded plaintiff and defendant each the sum of $73,063. In appeal No. 2, plaintiff appeals and defendant cross-appeals from an amended judgment that, inter alia, corrected the amount awarded to $78,954 each.

Preliminarily, the appeal and cross appeal from the judgment in appeal No. 1 must be dismissed inasmuch as the judgment has been superseded by the amended judgment (*see RES Exhibit Servs., LLC v Genesis Vision, Inc.* [appeal No. 3], 155 AD3d 1515, 1517 [4th Dept 2017]).

In appeal No. 2, we agree with defendant on her cross appeal that the court erred in granting plaintiff's motion for a directed verdict. "[I]t is reversible error to grant a motion for a directed verdict prior to the close of the party's case against whom a directed verdict is sought" (*Griffin v Clinton Green S., LLC*, 98 AD3d 41, 44 [1st Dept 2012]). "By its express language, [CPLR 4401] authorizes the grant of a motion for a directed verdict only if the opponent of the motion has presented evidence and closes his or her case. The requirement that each party await the conclusion of the other's case before moving for judgment [under CPLR 4401] is designed to afford all of them a day in court . . . Accordingly, the timing of a motion prescribed by CPLR 4401 must be strictly enforced and the grant of a dismissal [pursuant to CPLR 4401] prior to the close of the opposing party's case will be reversed as premature, even if the ultimate success of the opposing party in the action is improbable" (*id.* at 46 [internal quotation marks omitted]). Here, it is undisputed that plaintiff's motion was granted before defendant had an opportunity to present any evidence. Thus, it was error for the court to entertain plaintiff's motion (*see id.* at 47). We therefore modify the amended judgment by denying plaintiff's motion for a directed verdict, vacating the second, fourth, and fifth decretal paragraphs, and granting a new trial.

Inasmuch as we conclude on the record before us that there was no binding open court stipulation with respect to, inter alia, the value of the trust (*see* CPLR 2104), we further modify the amended judgment by vacating the third decretal paragraph. In light of our determination, plaintiff's contentions on her appeal regarding the amount of the judgment, interest, costs, and disbursements are academic.

We agree with defendant on her cross appeal that the stipulation of discontinuance entered into between plaintiff and codefendant, Summit Federal Credit Union (SFCU), is ineffective inasmuch as it was not signed by the attorneys of record for all parties (*see* CPLR 3217 [a] [2]; *C.W. Brown, Inc. v HCE, Inc.*, 8 AD3d 520, 521 [2d Dept 2004]). Furthermore, as correctly conceded by plaintiff, the court properly permitted defendant to file a cross claim against SFCU. We have considered defendant's remaining contention and conclude that it does not warrant further modification of the judgment.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1172

KA 19-02076

PRESENT: CARNI, J.P., LINDLEY, CURRAN, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIEN BELL-BRADLEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Erie County Court (Suzanne Maxwell Barnes, J.), dated October 23, 2019. The order denied defendant's motion to set aside the sentence pursuant to CPL 440.20.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order that denied his motion pursuant to CPL 440.20 seeking to set aside the sentence imposed upon his conviction of grand larceny in the third degree (Penal Law § 155.35 [1]) on the ground that he was illegally sentenced as a second felony offender. County Court denied the motion without considering the merits based upon its determination that defendant had the opportunity to challenge the legality of the sentence on his direct appeal, which was then pending, and that the facts and information relevant to the issue were available on direct appeal. Defendant now contends that the court erred in denying the motion without considering the merits, and we agree.

We note at the outset that it appears that the court erred in conflating the provisions of CPL 440.10 with those of CPL 440.20. The procedural bar set forth in CPL 440.10 (2) (b) applies only to motions made pursuant to section 440.10, and defendant's motion was made pursuant to section 440.20 (*see People v McCants*, 15 AD3d 892, 893 [4th Dept 2005]).

It is well settled that "[a] CPL 440.20 motion is the proper vehicle for raising a challenge to a sentence as 'unauthorized, illegally imposed or otherwise invalid as a matter of law' (CPL 440.20 [1]), and a determination of second felony offender status is an

aspect of the sentence" (*People v Jurgins*, 26 NY3d 607, 612 [2015]; *see People v Lopez*, 164 AD3d 1625, 1626 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]). "Mandatory denial of a motion pursuant to CPL 440.20 is required only when the issue 'was previously determined on the merits upon an appeal from the judgment or sentence' " (*People v Povoski*, 111 AD3d 1350, 1351 [4th Dept 2013], quoting CPL 440.20 [2]), and discretionary denial is available when the ground or issue raised in the motion "was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a prior motion or proceeding in a federal court" (CPL 440.20 [3]).

Here, the ground raised in the motion to set aside the sentence, i.e., that defendant was improperly sentenced as a second felony offender because his prior federal conviction of bank robbery is not equivalent to any felony in New York, was not previously determined on the merits upon an appeal from the judgment or any prior motion or proceeding (*see* CPL 440.20 [2], [3]). On defendant's direct appeal, this Court determined that defendant's challenge to the sentence was not properly before us because he failed to preserve that contention for appellate review and the narrow exception to the preservation rule did not apply (*People v Bell-Bradley*, 179 AD3d 1539, 1539-1540 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]; *see* CPL 470.05 [2]; *Lopez*, 164 AD3d at 1625; *see generally Jurgins*, 26 NY3d at 612). Furthermore, contrary to the determination of the court that "the facts and information relevant to this issue" were available for review on the direct appeal, this Court determined that the resolution of the unpreserved question whether defendant's federal conviction was equivalent to a New York felony would have required us to " 'resort to outside facts, documentation or foreign statutes' " (*Bell-Bradley*, 179 AD3d at 1540, quoting *People v Samms*, 95 NY2d 52, 57 [2000]).

Inasmuch as the court is not procedurally barred from considering the merits of the motion under CPL 440.20 (2), and the court lacks discretion to deny the motion without considering the merits under CPL 440.20 (3), we reverse the order and remit the matter to County Court for a determination of the motion on the merits (*see generally People v Ramos*, 108 AD2d 209, 210 [2d Dept 1985]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1198

CAF 19-01571

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF DIANE MOUNTZOUROS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH MOUNTZOUROS, RESPONDENT-APPELLANT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (HEIDI W. FEINBERG OF COUNSEL), FOR RESPONDENT-APPELLANT.

WENDY S. SISSON, GENESEO, FOR PETITIONER-RESPONDENT.

PAUL B. WATKINS, FAIRPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered July 23, 2019 in a proceeding pursuant to Family Court Act article 6. The order granted sole custody of the subject children to petitioner and suspended all visitation and communication between respondent and the subject children.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that granted petitioner mother's petition for modification of a prior stipulated custody and visitation order by awarding the mother sole custody of the two subject children and by suspending the father's visitation and communication with the children and any of their service providers. As a preliminary matter, it is undisputed on appeal that the father's incarceration upon his criminal conviction for sexually abusing an older sibling of the subject children constituted a sufficient change in circumstances to warrant an inquiry into whether modification of the stipulated custody and visitation order would be in the children's best interests (*see Matter of Naquan V. v Tia W.*, 172 AD3d 1467, 1468 [3d Dept 2019]; *Matter of Knight v Knight*, 92 AD3d 1090, 1092 [3d Dept 2012]; *Matter of Cole v Comfort*, 63 AD3d 1234, 1235 [3d Dept 2009], *lv denied* 13 NY3d 706 [2009]). Moreover, the father does not challenge Family Court's determination that, under the circumstances, granting the mother sole custody was in the children's best interests (*see Matter of Poromon v Evans*, 176 AD3d 1642, 1643 [4th Dept 2019]; *Matter of Hares v Walker*, 8 AD3d 1019, 1020 [4th Dept 2004]). Instead, the father contends that the court erred in determining that suspending

all visitation and communication between himself and the children was in the children's best interests. We reject that contention for the reasons that follow.

Although visitation with a noncustodial parent is presumed to be in the best interests of the child, even when the parent seeking visitation is incarcerated (*see Matter of Granger v Misercola*, 21 NY3d 86, 90-91 [2013]), "the presumption may be rebutted when it is shown, 'by a preponderance of the evidence, that visitation would be harmful to the child' " (*Matter of Fewell v Ratzel*, 121 AD3d 1542, 1542 [4th Dept 2014], quoting *Granger*, 21 NY3d at 92). "[T]he propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record" (*Matter of Brown v Terwilliger*, 108 AD3d 1047, 1048 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013] [internal quotation marks omitted]).

Here, as a threshold matter on this issue, although the father failed to include in the record the transcript of the prior testimony of a school aide of which the court took judicial notice, we conclude that the unchallenged detailed review of that testimony elsewhere in the record, along with the full hearing testimony of all other witnesses, permits meaningful appellate review of the father's challenge to the court's suspension of all visitation and communication with the children (*see Matter of Steven Glenn R.*, 51 AD3d 802, 802-803 [2d Dept 2008]). Nonetheless, to the extent that the father contends that the court erred in failing to afford him in-person visitation with the children at the correctional facility, that contention is not preserved for our review inasmuch as he never requested such visitation and, instead, requested only telephonic communication and written correspondence (*cf. Matter of April L.S. v Joshua F.*, 173 AD3d 1675, 1677 [4th Dept 2019]; *see generally Matter of Anthony MM. v Rena LL.*, 34 AD3d 1171, 1172 [3d Dept 2006], *lv denied* 8 NY3d 805 [2007]).

With respect to the father's preserved contention, although the court did not expressly determine whether the presumption in favor of visitation with the father was rebutted, "the record is adequate to enable us to determine that the mother established by a preponderance of the evidence that, under all the circumstances, 'visitation would be harmful to the child[ren's] welfare' " (*Matter of Rulinsky v West*, 107 AD3d 1507, 1509 [4th Dept 2013], quoting *Granger*, 21 NY3d at 91). The evidence, including the testimony of the mother and the school aide and the statements adduced at the *Lincoln* hearing with one of the subject children, established that the father was criminally convicted for sexually abusing the older sibling, that one of the subject children also disclosed sexual abuse by the father and exhibited behaviors indicative of such abuse, that prior telephone contact with the father was deeply disturbing to that child, and that the other subject child had not had contact with the father for years and feared him. Thus, although "visitation 'need not always include contact visitation at the prison' " (*Rulinsky*, 107 AD3d at 1509), we conclude that " 'a sound and substantial basis exist[s] in the record for the court's determination that the visitation requested by [the father]

would not be in the . . . child[ren's] best interest[s] under the present circumstances' " (*Matter of Bloom v Mancuso*, 175 AD3d 924, 926 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]; *see Matter of Newman v Doolittle*, 151 AD3d 1233, 1235 [3d Dept 2017]; *Matter of Kari CC. v Martin DD.*, 148 AD3d 1246, 1248 [3d Dept 2017]).

The father failed to preserve for our review his further contention that the court's determination to suspend his communication with the children's service providers is based solely upon inadmissible hearsay (*see Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1452 [4th Dept 2011], *lv denied* 17 NY3d 701 [2011]) and, in any event, we conclude that there is a sound and substantial basis in the record to support that determination (*see generally Matter of Andrea C. v David B.*, 146 AD3d 1104, 1107 [3d Dept 2017]).

The father also contends that reversal is required because the court did not advise him of his rights pursuant to Family Court Act § 262 (a) at the outset of the hearing. Here, the record reflects that the father already had assigned counsel by the time of the hearing and that the court, upon counsel's request, allowed the father, who appeared via telephone from his correctional facility, to confer privately with his counsel via telephone prior to proceeding with the hearing, at which his counsel appeared in person. Under such circumstances, we conclude that "there was no violation of the right to counsel or Family [Court] Act § 262" (*Matter of Holly J. v Frederick X.*, 95 AD3d 1595, 1597 [3d Dept 2012]; *see Matter of Delafrange v Delafrange*, 24 AD3d 1044, 1045-1046 [3d Dept 2005], *lv denied* 8 NY3d 809 [2007]). The father's related contention that the court should have granted an adjournment to provide him additional time to confer with counsel is not preserved for our review inasmuch as the father never requested an adjournment (*see generally Matter of Madalynn W. [Shawn W.]*, 185 AD3d 1458, 1459-1460 [4th Dept 2020]; *Matter of Jaydalee P. [Codilee R.]*, 156 AD3d 1477, 1477 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]). Finally, to the extent that the father contends that he was denied effective assistance of counsel, we conclude that his contention lacks merit (*see Matter of Ballard v Piston*, 178 AD3d 1397, 1398-1399 [4th Dept 2019], *lv denied* 35 NY3d 907 [2020]; *Matter of Sullivan v Sullivan*, 90 AD3d 1172, 1175 [3d Dept 2011]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1199

CAF 20-00660

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF GLORIA CHRISTMAN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOSHUA BLEAU, RESPONDENT-RESPONDENT.

TRACY L. PUGLIESE, ROME, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered September 19, 2019 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objection to an order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner appeals from an order denying its objection to an order of the Support Magistrate, which had granted its petition seeking an upward modification of respondent father's support obligation to the extent of directing the father to pay child support in the amount of $58 per week retroactive to the date the petition was filed. On appeal, petitioner contends that the Support Magistrate erred in directing that the modification of child support be retroactive to the date on which petitioner filed the petition, instead of the earlier date upon which the father was released from incarceration, and that Family Court therefore should have granted its objection. We affirm.

Although we agree with petitioner that, under certain circumstances, the court may order an upward modification of child support retroactive to a date prior to the filing of the modification petition (*see Matter of Oneida County Dept. of Social Servs. v Abu-Zamaq*, 177 AD3d 1412, 1413 [4th Dept 2019]; *Matter of Department of Social Servs. v Douglas D.*, 226 AD2d 633, 634 [2d Dept 1996]; *Matter of Monroe County Dept. of Social Servs. v Campbell*, 161 AD2d 1176, 1177 [4th Dept 1990]; *see also* Family Ct Act § 451), on this record, petitioner failed to present sufficient evidence supporting an upward modification retroactive to a date earlier than that ordered by the Support Magistrate (*see generally Matter of Rosenthal v Buck*, 281 AD2d 909, 909-910 [4th Dept 2001]). Moreover, contrary to petitioner's contention, Family Court Act § 449 (2) does not permit the court to direct that the child support modification be retroactive to the date

the father was released from incarceration under the circumstances of this case (*see generally Matter of Broome County Dept. of Social Servs. v Short*, 234 AD2d 772, 772-773 [3d Dept 1996]). We have considered petitioner's remaining contentions and conclude that they lack merit.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1212

KA 18-02184

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT BENTLEY, DEFENDANT-APPELLANT.

HAYDEN DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered October 25, 2018. The judgment convicted defendant upon a plea of guilty of offering a false instrument for filing in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of offering a false instrument for filing in the first degree (Penal Law § 175.35 [1]). As a preliminary matter, we note that, as the People correctly concede, defendant did not waive his right to appeal (*see People v Dangerfield*, 140 AD3d 1626, 1626 [4th Dept 2016], *lv denied* 28 NY3d 928 [2016]).

Defendant's contention that his guilty plea was not knowing, voluntary, and intelligent because he did not give an affirmative verbal acknowledgment of understanding when County Court explained to him his *Boykin* rights (*see Boykin v Alabama*, 395 US 238 [1969]) is not preserved for our review inasmuch as defendant did not move to withdraw his plea or to vacate the judgment of conviction on that ground (*see People v Hampton*, 142 AD3d 1305, 1306 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016], citing, inter alia, *People v Conceicao*, 26 NY3d 375, 382 [2015]; *see also People v Brown*, 151 AD3d 1951, 1951-1952 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]; *see generally People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]).

We have reviewed defendant's remaining contentions and conclude

that none warrants modification or reversal of the judgment.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1215

KA 19-01089

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW MADDISON, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 21, 2018. The judgment convicted defendant upon a plea of guilty of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that his purported waiver of the right to appeal is invalid. We agree (*see People v Jones*, 188 AD3d 1682, 1682 [4th Dept 2020]; *People v Brown*, 180 AD3d 1341, 1341 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]). By failing to move to withdraw his guilty plea or to vacate the judgment of conviction, defendant failed to preserve for our review his further contention that the plea was not knowingly, intelligently, and voluntarily entered (*see People v McCullen*, 162 AD3d 1661, 1661 [4th Dept 2018]), and this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). Indeed, nothing in the plea colloquy called into question the voluntariness of the plea or cast "significant doubt" on defendant's guilt, and County Court therefore had no duty to conduct further inquiry with respect to the plea (*id.*). In any event, we conclude that defendant knowingly, intelligently, and voluntarily entered his guilty plea (*see People v Rathburn*, 178 AD3d 1421, 1421-1422 [4th Dept 2019], *lv denied* 35 NY3d 944 [2020]). Finally, the sentence is not unduly harsh or severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1219

CAF 20-00694

PRESENT: WHALEN, P.J., SMITH, TROUTMAN, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF ALEX H., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ASPYN L., RESPONDENT-APPELLANT.

EDWARD F. MURPHY, III, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.

COLE & VALKENBURGH, P.C., BATH (MARK A. SCHLECHTER OF COUNSEL), FOR RESPONDENT-APPELLANT.

EDWARD F. MURPHY III, HAMMONDSPORT, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

MATTHEW J. BUZZETTI, ELMIRA, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Patrick F. McAllister, A.J.), entered September 17, 2019 in a proceeding pursuant to Family Court Act article 5. The order determined petitioner to be the father of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner father filed a paternity petition seeking a determination that he is the father of the subject child. Respondent mother filed an answer and asserted as an affirmative defense that the father is equitably estopped from asserting paternity. A hearing was held on whether the father's assertion of paternity was in the best interests of the child, at which the father, the paternal grandmother, the child's therapist, the mother's friend, and the mother testified. The mother and the Attorney for the Child both appeal from an order of filiation determining that the father is the father of the subject child.

Initially, neither the mother nor the Attorney for the Child (collectively, appellants) preserved for our review their contention that Family Court deprived them of a fair hearing by concluding the hearing during the mother's cross-examination. The appellants failed to object at the time the court indicated that it was prepared to rule on the paternity petition without the need for further evidence, and they waited until after an adverse determination was issued before claiming the need to present further evidence (*see generally Matter of*

Serna v Jones, 178 AD3d 1447, 1447 [4th Dept 2019], *lv denied* 35 NY3d 902 [2020]). In any event, we conclude that the contention is without merit. "The scope of the examination of witnesses rests within the trial court's sound discretion" (*Matter of Thomas C. [Jennifer C.]*, 81 AD3d 1301, 1302 [4th Dept 2011], *lv denied* 16 NY3d 712 [2011]), and the " 'trial court has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary' " (*Matter of Emily A. [Gina A.]*, 129 AD3d 1473, 1474 [4th Dept 2015]). Here, the appellants did not make an offer of proof regarding what the testimony of the remaining potential witness, i.e., the child's teacher, or any other allegedly unpresented testimony would have established with respect to the limited issue of equitable estoppel before the court. We therefore perceive no basis to conclude that the court abused its discretion by terminating the hearing.

Contrary to the mother's further contention, the court was not required to make its findings on that issue in writing (*see* CPLR 4213 [b]; Family Ct Act § 165 [a]), and the bench decision was sufficient to allow for effective appellate review (*cf. Matter of Carmellah Z. [Casey V.]* [appeal No. 2], 177 AD3d 1364, 1365 [4th Dept 2019]). The court stated in its bench decision that the evidence established that the father was in fact the child's biological father; there had been regular contact between the child and the father and his family for nine years; and the interruption in that contact appeared to be precipitated by the introduction of the father's girlfriend, at which point the mother ceased to encourage or facilitate the father-child relationship. Those facts are sufficient to support the court's determination that it was not in the best interests of the child to equitably estop the father from claiming paternity (*see generally Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1233

CAF 19-00663

PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, TROUTMAN, AND BANNISTER, JJ.

IN THE MATTER OF BEULAH J., IVORY J., AND EBONY J.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DARLENE H., RESPONDENT, AND JOHNNY J., RESPONDENT-APPELLANT.

KIMBERLY M. SEAGER, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

KIMBERLY M. SEAGER, FULTON, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

COURTNEY S. RADICK, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeals from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered March 21, 2019 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent Johnny J. with respect to the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the disposition with respect to Ebony J., and as modified the order is affirmed without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father and the Attorney for the Child (AFC) for Ebony J. (hereafter Ebony J.) each appeal from an order that, among other things, terminated the father's parental rights with respect to the three subject children on the ground of permanent neglect and freed those children for adoption.

By failing to raise the issue below, the father waived his contention that the petition was improperly filed before the children had been in the care of an authorized agency for one year (*see Matter of Brayanna G.*, 66 AD3d 1375, 1376 [4th Dept 2009], *lv denied* 13 NY3d

714 [2010]; *see generally Lacks v Lacks*, 41 NY2d 71, 75 [1976], *rearg denied* 41 NY2d 862, 901 [1977]). The father's related claim of ineffective assistance of counsel is not properly before us because it was raised for the first time in his reply brief (*see Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143, 1144 [4th Dept 2014]).

Contrary to the contention of the father and Ebony J., Family Court's finding of permanent neglect is supported by clear and convincing evidence establishing that, "despite diligent efforts by petitioner to encourage and strengthen the parental relationship, [the father] failed substantially and continuously or repeatedly to plan for the future of the children for a period of more than one year following their placement with petitioner, although physically and financially able to do so" (*Matter of Susan C. [Wesley C.]*, 1 AD3d 991, 991 [4th Dept 2003]; *see generally Matter of Star Leslie W.*, 63 NY2d 136, 142-143 [1984]). We reject the father's further contentions that the interests of Beulah J. and Ivory J. are not best served by terminating his parental rights with respect to them (*see Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1502 [4th Dept 2015]) and that the court abused its discretion in denying his request for a suspended judgment.

We agree with the father and Ebony J., however, that a new dispositional hearing for that child is required because terminating the father's parental rights to Ebony J. makes her a legal orphan and because the AFC who jointly represented the children at trial failed to zealously advocate for Ebony J.'s position concerning adoption and focused instead on her sisters' conflicting position on that issue (*see Matter of Dominique A.W.*, 17 AD3d 1038, 1039-1041 [4th Dept 2005], *lv denied* 5 NY3d 706 [2005]; *see also Matter of Gena S.* [*Karen M.*], 101 AD3d 1593, 1595 [4th Dept 2012], *lv dismissed* 21 NY3d 975 [2013]; *see generally Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1147 [4th Dept 2016]). We therefore modify the order by vacating the disposition as to Ebony J., and we remit the matter to Family Court for appointment of a new AFC and a new dispositional hearing for that child. In light of our determination, we do not consider the remaining contentions advanced by the father or Ebony J.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1242

KA 19-01434

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN SMALLWOOD, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS, DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered April 3, 2019. The judgment convicted defendant upon a jury verdict of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that the verdict is contrary to the weight of the evidence with respect to the elements of identity and intent to cause the death of the victim. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Initially, we conclude that defendant's contentions concerning the identity of the assailant are without merit in light of the evidence, including parts of his testimony, establishing that defendant was the assailant. With respect to his contention concerning the element of intent, insofar as relevant here, a person is guilty of murder in the second degree when, "[w]ith intent to cause the death of another person, he [or she] causes the death of such person" (Penal Law § 125.25 [1]). "Intent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Price*, 35 AD3d 1230, 1231 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007]; *see People v Spencer*, 181 AD3d 1257, 1258 [4th Dept 2020], *lv denied* 35 NY3d 1029 [2020]). A jury is also "entitled to infer that a defendant intended the natural and probable consequences of his [or her] acts" (*People v Hough*, 151 AD3d 1591, 1593 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017] [internal quotation marks

omitted]; *see People v Lozada*, 164 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]).

Here, the evidence at trial establishes that defendant struck the victim in the face, knocked him to the ground, beat him with a board, and jumped on his torso with both feet. As the result of that attack, the victim sustained broken bones in his face and chest, a laceration of his liver, hemorrhages in his brain and abdominal cavity, and a large tear in the left ventricle of his heart. The medical examiner testified that the ventricular injury could only have been caused by a very forceful blow to the victim's chest, as a result of which his "chest was compressed to the extent that the ventricle ruptured." Based on our review of all of the evidence, we conclude that the weight of the evidence supports the conclusion that defendant intended to cause the death of the victim (*see generally People v Taylor*, 134 AD3d 1165, 1167-1168 [3d Dept 2015], *lv denied* 26 NY3d 1150 [2016]).

Defendant contends that he was deprived of a fair trial by prosecutorial misconduct that occurred during the People's summation. First, we reject defendant's contention that he was deprived of a fair trial by two comments the prosecutor made during summation. One of the two comments at issue was " 'a fair response to defense counsel's summation [and] fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322 [4th Dept 2009], *lv denied* 12 NY3d 915 [2009]; *see People v Halm*, 81 NY2d 819, 821 [1993]), and "County Court's jury charge cured any potential prejudice caused by statements of the prosecutor on summation that may have shifted the burden of proof" with respect to the remaining comment (*People v Waterford*, 124 AD3d 1246, 1247-1248 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]; *see People v Rogers*, 103 AD3d 1150, 1153 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]). With respect to defendant's further contention that the prosecutor inappropriately displayed emotion during summation, that "claim[] . . . [is] unsupported by the record" (*People v Beale*, 209 AD2d 210, 210 [1st Dept 1994], *lv denied* 85 NY2d 906 [1995]). With respect to defendant's final contention in this regard, that the prosecutor improperly threw or dropped a board during summation, "[t]he prosecutor's demonstration . . . , even if inappropriate, was not pervasive so as to deprive defendant of a fair trial" (*People v Lazzarro*, 62 AD3d 1035, 1036 [3d Dept 2009]; *see generally People v Anderson*, 29 NY3d 69, 72 [2017], *rearg denied* 29 NY3d 1074 [2017], *cert denied* — US —, 138 S Ct 457 [2017]).

We reject defendant's further contention that the court erred in denying his request for a mistrial, which was based on the alleged improprieties during the prosecutor's summation. "The decision whether to grant a mistrial is within the sound discretion of the trial court and should not be disturbed, particularly where, as here, the decision involves the trial court's assessment of the impact of certain conduct upon a jury . . . Additionally, the court's curative instruction minimized any prejudice caused by the prosecutor's comments" (*People v Samuel*, 251 AD2d 1038, 1038 [4th Dept 1998], *lv denied* 92 NY2d 905 [1998]).

The sentence is not unduly harsh or severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1243

KA 18-02395

PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, WINSLOW, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWREN GOINS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered January 9, 2018. The judgment convicted defendant upon a plea of guilty of manslaughter in the first degree and attempted murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]), arising from a shooting in which one victim was killed and another was wounded. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenges to Supreme Court's refusal to suppress identification testimony and the severity of his sentence (*see People v Herman*, 151 AD3d 1866, 1867 [4th Dept 2017], *lv denied* 29 NY3d 1127 [2017]; *People v Hankerson*, 61 AD3d 1424, 1425 [4th Dept 2009], *lv denied* 13 NY3d 744 [2009]), we nevertheless conclude that those challenges lack merit.

We reject defendant's contention that the court erred in refusing to suppress identification testimony based on allegedly suggestive photo array identification procedures conducted by the police. Initially, defendant "failed to preserve for our review his contention that the photo array was unduly suggestive because he was the only subject therein [whose] eyes" were looking slightly to the right (*People v Bell*, 19 AD3d 1074, 1075 [4th Dept 2005], *lv denied* 5 NY3d 803 [2005], *reconsideration denied* 5 NY3d 850 [2005]). In any event, that contention is without merit. The photos in the array depict six males of similar age, skin tone, hairstyle, and physical features. "Although defendant is the only person in the array looking [slightly]

to his [right], the viewer's attention is not drawn to defendant's photo in such a way as to indicate that the police were urging a particular selection" (*People v Rogers*, 245 AD2d 1041, 1041 [4th Dept 1997]; *see People v Lee*, 96 NY2d 157, 163 [2001]). "Nor was there any evidence at the *Wade* hearing indicating that the identification procedures [otherwise] employed by the police were unduly suggestive" (*People v Linder*, 114 AD3d 1200, 1201 [4th Dept 2014], *lv denied* 23 NY3d 1022 [2014]; *see People v Hoffman*, 162 AD3d 1753, 1755 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018]). The court was entitled to credit the testimony of the detective at the hearing that the witness was not urged or influenced in any way to make a particular selection from the photo array (*see People v Rios*, 72 AD3d 1489, 1490 [4th Dept 2010], *lv denied* 15 NY3d 777 [2010], *reconsideration denied* 16 NY3d 799 [2011]). " 'The evaluation of credibility by the hearing court is entitled to great weight and its determination will be not disturbed where, as here, it is supported by the record' " (*People v Johnson*, 262 AD2d 1004, 1005 [4th Dept 1999], *lv denied* 93 NY2d 1020 [1999]). We thus conclude that the court properly determined that the People met their initial burden of establishing that the police conduct with respect to the photo array procedure was reasonable and that defendant failed to meet his ultimate burden of proving that the procedure was unduly suggestive (*see People v Logan*, 178 AD3d 1386, 1387 [4th Dept 2019], *lv denied* 35 NY3d 1028 [2020]; *see generally People v Chipp*, 75 NY2d 327, 335 [1990], *cert denied* 498 US 833 [1990]).

Contrary to defendant's further contention, we conclude that the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). Finally, to the extent that defendant has raised an alleged *Brady* violation, that allegation concerns matters outside the record on appeal and thus may properly be raised by way of a motion pursuant to CPL article 440 (*see People v Johnson*, 88 AD3d 1293, 1294 [4th Dept 2011]; *People v Ellis*, 73 AD3d 1433, 1434 [4th Dept 2010], *lv denied* 15 NY3d 851 [2010]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 19-00508

PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHARLIE MIXON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 13, 2018. The order, insofar as appealed from, denied that part of the motion of defendant seeking forensic DNA testing pursuant to CPL 440.30 (1-a).

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at Supreme Court.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

3

KA 20-00289

PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS B. MAHAR, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Wayne County Court (John B. Nesbitt, J.), entered August 15, 2019. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*) after a conviction of sexual abuse in the first degree (Penal Law § 130.65 [3]). We agree with defendant to the extent that he contends that County Court made only general and conclusory findings of fact and conclusions of law. We are thus unable to conduct a meaningful review of the court's risk level assessment, particularly with respect to the court's assessment of points for risk factors 3, 4, and 12 (*see People v Leopold*, 13 NY3d 923, 924 [2010]; *People v Dean*, 169 AD3d 1414, 1415 [4th Dept 2019]; *People v Cameron*, 87 AD3d 1366, 1366-1367 [4th Dept 2011]). We therefore hold the case, reserve decision, and remit the matter to County Court to prepare statutorily compliant findings of fact and conclusions of law (*see* Correction Law §§ 168-d [3]; 168-n [3]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

4

KA 16-01548

PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY VELAZQUEZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered August 23, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

14

CAF 19-00053

PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF ADAM HENSHAW,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CAROLINE HILDEBRAND, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

CARA A. WALDMAN, FAIRPORT, FOR PETITIONER-APPELLANT.

PAUL BLEAKLEY, GENEVA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered October 29, 2018 in a proceeding pursuant to Family Court Act article 8. The order granted respondent's motion to dismiss the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: In appeal No. 1, petitioner father appeals from an order granting respondent mother's motion to dismiss his family offense petition brought against her under Family Court Act article 8. In appeal No. 2, the father appeals from an order granting the mother's oral motion to dismiss his petition seeking enforcement of an existing custody and visitation order against her under article 6.

We agree with the father in appeal No. 1 that Family Court erred in granting the motion. The father stated a cause of action for at least harassment in the second degree under Penal Law § 240.26 (3), based on his allegations that the mother contacted him by text and telephone a minimum of 110 times over two days, even after he told her to stop contacting him (*see Matter of Angelique QQ. v Thomas RR.*, 151 AD3d 1322, 1323 [3d Dept 2017]; *Matter of James XX. v Tracey YY.*, 146 AD3d 1036, 1039 [3d Dept 2017]; *see also Matter of Finn v Harrison*, 188 AD3d 1200, 1201 [2d Dept 2020]). Contrary to the mother's assertion, there is no requirement that a family offense petition be verified (*see* Family Ct Act § 821 [1]; *Matter of Ellen Z. v Isaac D.*, 47 Misc 3d 389, 392 [Family Ct, Queens County 2015]). We further agree with the father that the court acquired personal jurisdiction over the mother with respect to the family offense petition, despite the fact that she was residing in Texas, inasmuch as the father fulfilled all necessary requirements (*see* CPLR 302 [b]; Family Ct Act

§ 154 [c]), and the mother admitted service of the family offense petition by mail (*see* CPLR 312-a). We therefore reverse the order in appeal No. 1, deny the motion, reinstate the family offense petition, and remit the matter to Family Court for further proceedings on the petition.

With respect to appeal No. 2, we note as a preliminary matter that the mother's oral motion to dismiss the enforcement petition was not made on notice, and thus the father may not appeal as of right from the order deciding that motion (*see* CPLR 5701 [a] [2], [3]; *Braun v Cesareo* [appeal No. 6], 170 AD3d 1540, 1541 [4th Dept 2019]; *see also Sholes v Meagher*, 100 NY2d 333, 335 [2003]). In the exercise of our discretion, however, we treat the notice of appeal in appeal No. 2 as an application for permission to appeal and grant such permission (*see Czechowski v Buffalo Niagara Med. Campus, Inc.*, 175 AD3d 1817, 1817 [4th Dept 2019]).

We agree with the father in appeal No. 2 that the court erred in granting the motion. Insofar as the court granted the motion on the ground that the State of Texas was the appropriate forum, " '[t]he issue of inconvenient forum dismissal is addressed to Family Court's discretion after consideration of the statutory factors' " (*Matter of Montanez v Tompkinson*, 167 AD3d 616, 618 [2d Dept 2018]; *see* Domestic Relations Law § 76-f [2]), and thus "[t]he court is required to consider the statutory factors and allow the parties to submit information regarding these factors before determining that New York is an inconvenient forum" (*Matter of Helmeyer v Setzer*, 173 AD3d 740, 743 [2d Dept 2019]). Here, the court failed to permit the father to submit information concerning the statutory factors, and the record does not indicate whether the court considered them; thus, the court erred insofar as it granted the motion on that basis (*see Graves v Huff* [appeal No. 2], 169 AD3d 1476, 1477 [4th Dept 2019]). In any event, we conclude that the court erred in granting the motion inasmuch as the mother submitted no evidence in support of the motion and failed to specify any statutory or other legal basis for the requested relief (*see LaGuardia v City of New York*, 237 AD2d 257, 257 [2d Dept 1997]; *see also Village of Sharon Springs v Barr*, 165 AD3d 1445, 1447 [3d Dept 2018]; *Matter of Goodyear v New York State Dept. of Health*, 163 AD3d 1427, 1428 [4th Dept 2018], *lv denied* 32 NY3d 914 [2019]). We note that the mother had several months to make a proper motion on notice to dismiss the enforcement petition, but she did not do so (*see generally Matter of Clark v Kittles*, 160 AD3d 1420, 1421 [4th Dept 2018], *lv denied* 31 NY3d 911 [2018]). We therefore reverse the order in appeal No. 2, deny the motion, reinstate the enforcement petition, and remit the matter to Family Court for further proceedings on the petition. Inasmuch as the limited information in the record before us reflects that the father has had no visitation or contact with the child named in the enforcement petition since the summer of 2017, we direct the court to hold such proceedings forthwith.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

15

CAF 19-00054

PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF ADAM HENSHAW,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CAROLINE HILDEBRAND, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

CARA A. WALDMAN, FAIRPORT, FOR PETITIONER-APPELLANT.

PAUL BLEAKLEY, GENEVA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered October 29, 2018 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion to dismiss the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the same memorandum as in *Matter of Henshaw v Hildebrand* ([appeal No. 1] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 20-00903

PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

HILARY LESNIAK, AS ADMINISTRATRIX OF THE ESTATE OF KATHRYN PODESWIK, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

WELLS FARGO BANK NA, SUCCESSOR BY MERGER TO WELLS FARGO BANK MINNESOTA, NA, AS TRUSTEE FORMERLY KNOWN AS NORWEST BANK MINNESOTA, NA, AS TRUSTEE FOR THE DELTA FUNDING HOME EQUITY LOAN ASSET-BACKED CERTIFICATE SERIES 1999-2, PETER T. ROACH & ASSOCIATES, P.C., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

GARY M. KANELLIS, ESQ., NONPARTY RESPONDENT.

MARK W. BLANCHARD, WHITE PLAINS, FOR PLAINTIFF-APPELLANT.

GREENBERG TRAURIG, LLP, NEW YORK CITY (STEVEN LAZAR OF COUNSEL), FOR DEFENDANT-RESPONDENT WELLS FARGO BANK NA, SUCCESSOR BY MERGER TO WELLS FARGO BANK MINNESOTA, NA, AS TRUSTEE FORMERLY KNOWN AS NORWEST BANK MINNESOTA, NA, AS TRUSTEE FOR THE DELTA FUNDING HOME EQUITY LOAN ASSET-BACKED CERTIFICATE SERIES 1999-2.

ROACH & LIN, P.C., SYOSSET (MICHAEL C. MANNIELLO OF COUNSEL), FOR DEFENDANT-RESPONDENT PETER T. ROACH & ASSOCIATES, P.C.

SHAPIRO, DICARO & BARAK, LLC, ROCHESTER (ELLIS M. OSTER OF COUNSEL), FOR NONPARTY RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Charles C. Merrell, J.), entered February 18, 2020. The order granted in part the motion of nonparty Gary M. Kanellis, Esq. to quash a subpoena and notice to take deposition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 19-02192

PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

KAREN R. BARNUM, PLAINTIFF-APPELLANT,

V ORDER

CORAZON Y. MARAMAG, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

PETER H. STOCKMANN, JAMESVILLE, FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered November 21, 2019. The order granted the motion of defendant Corazon Y. Maramag for summary judgment dismissing the complaint against her.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

23.1

CA 19-01253

PRESENT: WHALEN, P.J., SMITH, CENTRA, TROUTMAN, AND WINSLOW, JJ.

CHRISTOPHER FISCHER AND GABRIELLE LONERGAN,
ON BEHALF OF THEMSELVES AND ALL OTHER EMPLOYEES
SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

V ORDER

JOSEPH GARGANO, SENIOR, AND JOSEPH GARGANO, JUNIOR,
DEFENDANTS-RESPONDENTS.

THOMAS & SOLOMON LLP, ROCHESTER (JESSICA L. LUKASIEWICZ OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GROSS SHUMAN P.C., BUFFALO (KEVIN R. LELONEK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered June 7, 2019. The order, insofar as appealed from, granted defendants' motion for summary judgment dismissing the complaint against defendant Joseph Gargano, Senior.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 21, 2020,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

24

KA 19-01172

PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JENNA THOMPSON, DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered February 19, 2019. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

27

KA 19-01949

PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SALVATORE LETIZIA, DEFENDANT-APPELLANT.

SALVATORE LETIZIA, DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), dated September 23, 2019. The order, insofar as appealed from, denied that part of the motion of defendant for DNA testing pursuant to CPL 440.30 (1-a).

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from an order insofar as it denied without a hearing that part of his motion seeking, pursuant to CPL 440.30 (1-a), to have forensic DNA testing performed on a hair recovered from a knife used in the attack underlying defendant's conviction of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant's conviction arose from the beating and stabbing of a victim in his home by defendant and an accomplice (*People v Letizia*, 159 AD2d 1010, 1011 [4th Dept 1990], *lv denied* 76 NY2d 738 [1990]). On appeal, we affirmed the judgment convicting defendant of those crimes (*id.*). At trial, the victim testified that defendant and his accomplice both stabbed the victim using the same knife. A forensic scientist testified that the laboratory collected a "[s]uspected hair" on a knife collected from the scene, but did not perform DNA testing on that hair.

Supreme Court properly denied without a hearing defendant's motion with respect to DNA testing "inasmuch as that issue was previously raised and addressed on the merits on defendant's prior motion seeking the same relief" (*People v Simmons*, 180 AD3d 1328, 1328 [4th Dept 2020], *lv denied* 35 NY3d 974 [2020]; *see People v Letizia*, 141 AD3d 1129, 1130 [4th Dept 2016], *lv denied* 28 NY3d 1073 [2016], *reconsideration denied* 28 NY3d 1186 [2017]). In any event, the court also properly denied that part of the motion on the merits because

even if the requested item was subjected to DNA testing and such testing revealed the presence of DNA that did not belong to defendant, there would be "no reasonable probability that defendant would have received a more favorable verdict had those test results been introduced at trial" (*Letizia*, 141 AD3d at 1130 [internal quotation marks omitted]; *see People v Swift*, 108 AD3d 1060, 1061 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013]). As we previously noted, the victim testified that defendant, who was previously known to him, participated in the assault, and that testimony "would not have been impeached or controverted by evidence that the DNA of another individual[, including that of the victim himself,] was discovered on the knife" (*Letizia*, 141 AD3d at 1130 [internal quotation marks omitted]; *see Swift*, 108 AD3d at 1062).

Finally, inasmuch as defendant failed to obtain leave to appeal from the order insofar as it denied those parts of his motion seeking relief pursuant to CPL 440.10 and 440.20, his remaining contentions, all of which stem from the denial of those parts of the motion, are not properly before us on this appeal (*see* CPL 450.15 [1], [2]; *People v Loiz* [appeal No. 2], 175 AD3d 872, 873 [4th Dept 2019]; *People v Fuller*, 124 AD3d 1394, 1395 [4th Dept 2015], *lv denied* 25 NY3d 989 [2015]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

39

CA 20-00502

PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

RICHARD G. VOGT, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF LINDA VOGT, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

UNIVERSITY OF ROCHESTER, INC., STRONG MEMORIAL HOSPITAL AND CHRISTOPHER F. GALTON, M.D., DEFENDANTS-RESPONDENTS.

DAVID A. JOHNS, PULTNEYVILLE, FOR PLAINTIFF-APPELLANT.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (DANIEL P. PURCELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered February 13, 2020. The order granted the motion of defendants for dismissal of plaintiff's claim for punitive damages.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

41

CA 20-00110

PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

SANDRA RAMSEY, INDIVIDUALLY, AND JAMES A. RAMSEY, AS EXECUTOR OF THE ESTATE OF ERNEST H. RAMSEY, DECEASED, PLAINTIFFS-RESPONDENTS,

V ORDER

VICKY K. STEPHENS, P.A., DELPHI HEALTHCARE, PLLC, JANET K. REISMAN, R.N., JONES MEMORIAL HOSPITAL, AND THE MEMORIAL HOSPITAL OF WILLIAM F. AND GERTRUDE F. JONES, INC., DOING BUSINESS AS JONES MEMORIAL HOSPITAL, DEFENDANTS-APPELLANTS.

HIRSCH & TUBIOLO, P.C., ROCHESTER (BRYAN S. KORNFIELD OF COUNSEL), FOR DEFENDANTS-APPELLANTS VICKY K. STEPHENS, P.A., AND DELPHI HEALTHCARE, PLLC.

COLUCCI & GALLAHER, P.C., BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS JANET K. REISMAN, R.N., JONES MEMORIAL HOSPITAL, AND THE MEMORIAL HOSPITAL OF WILLIAM F. AND GERTRUDE F. JONES, INC., DOING BUSINESS AS JONES MEMORIAL HOSPITAL.

BLACK, LYLE & HABBERFIELD, LLP, OLEAN (KEVIN M. HABBERFIELD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered December 31, 2019. The order denied the motion of defendants Vicky K. Stephens, P.A., and Delphi Healthcare, PLLC, for summary judgment and denied in part the motion of defendants Janet K. Reisman, R.N., Jones Memorial Hospital, and the Memorial Hospital of William F. and Gertrude F. Jones, Inc., doing business as Jones Memorial Hospital, for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

44

CA 20-00833

PRESENT: CARNI, J.P., LINDLEY, CURRAN, TROUTMAN, AND BANNISTER, JJ.

MICHAEL DAVIS, CLAIMANT-APPELLANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT-APPELLANT.
(CLAIM NO. 131072.)

GROSS SHUMAN P.C., BUFFALO, SMALL LAW FIRM (CRAIG Z. SMALL OF COUNSEL), FOR CLAIMANT-APPELLANT-RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BEEZLY J. KIERNAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered December 26, 2019. The order, inter alia, granted the motion of defendant for leave to amend its answer.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

45

KA 16-02103

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SARAH FERGUSON, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered September 1, 2016. The appeal was held by this Court by order entered November 8, 2019, decision was reserved and the matter was remitted to Oneida County Court for further proceedings (177 AD3d 1247 [4th Dept 2019]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to hold a conference or summary hearing to determine what information should be redacted from the presentence report (*People v Ferguson*, 177 AD3d 1247, 1250 [4th Dept 2019]). In that prior decision, we rejected defendant's remaining contentions. Upon remittal, the court, with all parties present, resolved the issues regarding the presentence report. Defendant raises no contentions on resubmission, and we therefore affirm the judgment.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

46

KA 17-02052

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT L. SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 8, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals, in appeal No. 1, from a judgment convicting him, upon his plea of guilty, of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). In appeal No. 2, he appeals from a further judgment convicting him, also upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). In both appeals, defendant contends that his waivers of the right to appeal are invalid and that the sentences are unduly harsh and severe. Even assuming, arguendo, that defendant's waivers of the right to appeal in both cases are invalid (*see People v Bisono*, — NY3d —, 2020 NY Slip Op 07484, *2 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and thus do not preclude our review of his challenge to the severity of the sentences (*see People v Viehdeffer*, 189 AD3d 2143, 2144 [4th Dept 2020]; *People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentences are not unduly harsh or severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

47

KA 17-02053

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 8, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same memorandum as in *People v Smith* ([appeal No. 1] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

49

KA 19-00089

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTIAN DAVIDSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 20, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of two counts of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [5]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted rape in the first degree (§§ 110.00, 130.35 [1]). As the People correctly concede in each appeal, defendant did not validly waive his right to appeal from either judgment (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The sentences, however, are not unduly harsh or severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

50

KA 19-00090

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTIAN DAVIDSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 20, 2018. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same memorandum as in *People v Davidson* ([appeal No. 1] — AD3d — [Feb. 5, 2021] [4th Dept 2021]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

51

KA 12-00216

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VLADIMIR V. VERIN, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered August 19, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of criminal contempt in the first degree (Penal Law § 215.51 [b] [vi]) and sentencing him to a term of incarceration based on his admission that he violated three conditions of probation. We affirm.

Defendant contends that his admission to the violation of probation was not knowingly, voluntarily, or intelligently entered and that his waiver of the right to appeal is invalid. Because defendant's challenge to the voluntariness of his admission survives even a valid waiver of the right to appeal (*see People v Fairman*, 38 AD3d 1346, 1347 [4th Dept 2007], *lv denied* 9 NY3d 865 [2007]; *see also People v Hazel*, 145 AD3d 797, 798 [2d Dept 2016], *lv denied* 29 NY3d 949 [2017]), there is no reason for us to address defendant's contention regarding the validity of the waiver in this case.

Defendant's contention concerning the voluntariness of his admission is unpreserved for our review because defendant did not move on that ground either to withdraw his admission to the violation of probation or to vacate the judgment revoking his sentence of probation (*see People v Fox*, 159 AD3d 1435, 1435 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]; *People v Carncross*, 48 AD3d 1187, 1187 [4th Dept 2008], *lv dismissed* 10 NY3d 932 [2008], *lv denied* 11 NY3d 830 [2008]; *People v Barra*, 45 AD3d 1393, 1393-1394 [4th Dept 2007], *lv denied* 10

NY3d 761 [2008]). Moreover, the narrow exception to the preservation rule does not apply here (*see People v Lopez*, 71 NY2d 662, 666 [1988]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

55

KA 18-00300

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEMORRIS DEXTER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 8, 2017. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree and offering a false instrument for filing in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and offering a false instrument for filing in the first degree (§ 175.35 [1]). We affirm.

Viewing the evidence independently and in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Beckwith*, 182 AD3d 995, 995 [4th Dept 2020]), we reject defendant's contention that the verdict is against the weight of the evidence on the knowledge element of each crime (*see People v Rice*, 105 AD3d 1443, 1444 [4th Dept 2013], *lv denied* 21 NY3d 1076 [2013]; *People v Moore*, 41 AD3d 1202, 1203-1204 [4th Dept 2007], *lv denied* 9 NY3d 879 [2007]; *see generally People v Silberzweig*, 58 AD3d 762, 762-763 [2d Dept 2009], *lv denied* 12 NY3d 920 [2009]). Notably, defendant does not challenge the jury's determination that the People proved beyond a reasonable doubt that he filed a forged and false deed with intent to defraud (*see generally* Penal Law §§ 170.25, 175.35 [1]; *People v Dallas*, 46 AD3d 489, 491 [1st Dept 2007], *lv denied* 10 NY3d 809 [2008], *reconsideration denied* 10 NY3d 933 [2008]). We further note that the People's brief incorrectly states that, in conducting our weight of the evidence review, "[t]he jury's determinations should be given great weight . . . and should not be disturbed unless clearly unsupported by the record" (*see People v*

Gant, 189 AD3d 2160, 2161 [4th Dept 2020], citing *People v Sanchez*, 32 NY3d 1021, 1022-1023 [2018]). The proper standard for conducting weight of the evidence review is set forth in *People v Delamota* (18 NY3d 107, 116-117 [2011]) and *Danielson* (9 NY3d at 349).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

65

CA 20-00653

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

DAVID MOLTRUP, PLAINTIFF-APPELLANT,

V ORDER

LINDA JOYCE REID, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

AARON ZIMMERMAN, SYRACUSE, FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTIN L. NORFLEET OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered April 24, 2020. The order, among other things, denied plaintiff's motion for partial summary judgment on the issue of liability.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

66

CA 20-00799

PRESENT: SMITH, J.P., LINDLEY, NEMOYER, CURRAN, AND DEJOSEPH, JJ.

DAVID MOLTRUP, PLAINTIFF-APPELLANT,

V ORDER

LINDA JOYCE REID, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

AARON ZIMMERMAN, SYRACUSE, FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTIN L. NORFLEET OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered December 24, 2019. The order, among other things, denied plaintiff's ex parte motion for default judgment and granted the cross motion of defendant to compel plaintiff to accept defendant's late answer.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

70

KA 19-00491

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZIYKEYUN PRATHER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 15, 2019. The judgment convicted defendant upon a plea of guilty of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). As defendant contends and the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-568 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Johnson*, 182 AD3d 1036, 1036 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020]). The better practice is for Supreme Court "to use the Model Colloquy, which 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right to Appeal). Nevertheless, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 19-02354

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT T. WILLIAMS, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered September 12, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree (two counts) and aggravated family offense.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of aggravated family offense (Penal Law § 240.75 [1]) and two counts of criminal contempt in the first degree (§ 215.51 [c], [d]). Defendant contends that County Court erred in ordering him to pay restitution because restitution was not part of the plea agreement and the amount of restitution is not supported by the record. Defendant failed to preserve his contention for our review inasmuch as he " 'fail[ed] to object to the imposition of restitution at sentencing or to request a hearing' " (*People v Rodriguez*, 173 AD3d 1840, 1841 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]; *see People v Lee*, 96 AD3d 1522, 1527-1528 [4th Dept 2012]; *see generally People v Williams*, 27 NY3d 212, 219-225 [2016]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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KA 20-01122

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ISAIAH N. JAMISON, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered July 25, 2016. The judgment convicted defendant, upon a plea of guilty, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

80

CAF 19-00812

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF JOHN SANTORO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AMBER GUGGI, RESPONDENT-RESPONDENT.

IN THE MATTER OF AMBER GUGGI,
PETITIONER-RESPONDENT,

V

JOHN SANTORO, RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

STEPHANIE N. DAVIS, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered January 8, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed petitioner-respondent John Santoro's modification petition and violation petitions.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent father filed a modification petition and violation petitions and respondent-petitioner mother filed a modification petition and violation petition. Pursuant to a 2006 order on consent that was subsequently modified by a 2010 order on consent, the mother had sole custody of the subject child, the father had such visitation as agreed by the parties, and the father was permitted to write letters to the child. The father now appeals from an order that, inter alia, denied his petition seeking, among other things, in-person visitation with the child at the correctional facility in which he is currently incarcerated, denied his violation petitions, and granted, in part, the petition of the mother by limiting the father's access to the child to writing one letter per month.

With respect to the father's contention that Family Court should

have granted his petition insofar as he sought in-person visitation with the child, it is well settled that "visitation with a noncustodial parent is presumed to be in the best interests of the child, even when the parent seeking visitation is incarcerated" (*Matter of Bloom v Mancuso*, 175 AD3d 924, 926 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]; *see Matter of Granger v Misercola*, 21 NY3d 86, 90-91 [2013]). That presumption, however, is rebuttable, and a demonstration by a preponderance of the evidence "that such visitation would be harmful to the child will justify denying such a request" (*Granger*, 21 NY3d at 91 [internal quotation marks omitted]; *see Matter of Rulinsky v West*, 107 AD3d 1507, 1509 [4th Dept 2013]). Although the court did not make a finding with respect to whether the mother rebutted the presumption, the "record is adequate to enable us to determine that the mother established by a preponderance of the evidence that, under all the circumstances, 'visitation would be harmful to the child's welfare' " (*Rulinsky*, 107 AD3d at 1509, quoting *Granger*, 21 NY3d at 91).

We further conclude that a sound and substantial basis in the record supports the court's determination to limit the father's access to the child to writing one letter per month (*see generally Matter of Smith v Stewart*, 145 AD3d 1534, 1535 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *Matter of Brown v Terwilliger*, 108 AD3d 1047, 1048 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013]). The record includes, among other things, evidence that the father had virtually no relationship with the child prior to his most recent incarceration (*see Bloom*, 175 AD3d at 926), and the letters he wrote to her in the past contained numerous derogatory remarks about the mother, which the child resented. Also, as noted by the court in its written decision, the child strongly preferred to have no contact with the father, and "[a]lthough the [c]ourt is . . . not required to abide by the wishes of a child to the exclusion of the other factors in the best interests analysis . . . , the wishes of the [14]-year-old child are . . . entitled to great weight where, as here, the age and maturity [of the child] would make [her] input particularly meaningful" (*Matter of Alwardt v Connolly*, 183 AD3d 1252, 1253-1254 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020] [internal quotation marks omitted]). The child was aware through her own internet searches of the crimes towards women for which defendant was incarcerated, and the child was afraid of the father because of the disturbing nature of those crimes (*see Matter of Dibble v Valachovic*, 141 AD3d 774, 775-776 [3d Dept 2016]).

The father next contends that the court erred in dismissing his violation petitions. We reject that contention and conclude that "the court properly determined that [the father] failed to establish by clear and convincing evidence that the mother willfully violated the terms of the custody order[s] with respect to his visitation" (*Matter of Unczur v Welch*, 159 AD3d 1405, 1405 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]). We have reviewed the father's remaining contentions and conclude that they are either unpreserved or without merit.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CAF 18-02380

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF HARMONY W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JESSICA W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MELISSA J. HORVATITS OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered December 4, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, revoked a suspended judgment and terminated the parental rights of respondent with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent mother appeals from an order that, inter alia, revoked a prior suspended judgment entered upon her admission to permanently neglecting the subject child and terminated her parental rights with respect to that child. We affirm. Contrary to the mother's contention, Family Court did not abuse its discretion in refusing to extend the suspended judgment (*see Matter of Leala T.*, 55 AD3d 997, 998 [3d Dept 2008]; *see generally* Family Ct Act § 633 [f]).

The mother's appeal "from the order revoking the suspended judgment[] do[es] not bring up for review the prior orders and proceedings in the matter," including the suspended judgment itself (*Matter of Bryan W.*, 299 AD2d 929, 930 [4th Dept 2002], *lv denied* 99 NY2d 506 [2003]; *see Matter of Nicole Lee B.*, 256 AD2d 1103, 1105 [4th Dept 1998]; *see also People v Lawlor*, 49 AD3d 1270, 1270 [4th Dept 2008], *lv denied* 10 NY3d 936 [2008]; *Schieck v Schieck*, 138 AD2d 688, 691 [2d Dept 1988]; *but see Matter of Ulawrence J.*, 10 AD3d 658, 658 [2d Dept 2004]). Thus, the mother's current claim of ineffective assistance in connection with the suspended judgment itself is not reviewable on this appeal (*see Matter of Gerald BB.*, 51 AD3d 1081, 1082-1083 [3d Dept 2008], *lv denied* 11 NY3d 703 [2008], *rearg denied*

12 NY3d 776 [2009]; *Bryan W.*, 299 AD2d at 930). The mother's remaining challenges to the suspended judgment, i.e., that it was procedurally deficient, substantively unreasonable, and involuntarily entered, are likewise not reviewable on appeal from the order revoking the suspended judgment (*see Bryan W.*, 299 AD2d at 930). The mother's "remedy with respect to each contention [directed at the suspended judgment] is to move in Family Court to vacate [such judgment]" (*Matter of Ras v Rupp*, 295 AD2d 892, 893 [4th Dept 2002]; *see Matter of Dimitry E. [Clarissa E.]*, 177 AD3d 1223, 1224 [3d Dept 2019]; *Matter of Jessica M. v Julio G.R.*, 176 AD3d 584, 585 [1st Dept 2019]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

84

CAF 19-00173

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF HARMONY W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

JESSICA W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MELISSA J. HORVATITS OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered December 21, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Machado v Tanoury*, 142 AD3d 1322, 1322-1323 [4th Dept 2016]; *Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

85

CAF 20-00088

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF HARMONY W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

JESSICA W., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MELISSA J. HORVATITS OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an amended order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered February 19, 2019 in a proceeding pursuant to Social Services Law § 384-b. The amended order terminated the parental rights of respondent with respect to the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see* Family Ct Act § 1113; *Matter of Liliana G. [Orena G.]*, 91 AD3d 1325, 1326 [4th Dept 2012]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

88

CA 19-01634

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

BENJAMIN L. JOLLEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AGOSTINHA R. LANDO, DEFENDANT-APPELLANT.

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR DEFENDANT-APPELLANT.

MILLER MAYER LLP, ITHACA (ANTHONY N. ELIA, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Robert B. Wiggins, A.J.), entered August 23, 2019. The order, among other things, found defendant to be in contempt for failing to comply with prior orders and imposed a fine.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the finding of contempt and the imposition of a fine upon the contempt and as modified the order is affirmed without costs.

Memorandum: In this equitable distribution action, defendant appeals from an order determining various motions by the parties after the entry of an order that equitably distributed the marital property (prior order). Part of the prior order concerned the equitable distribution of the Lindley property and Country Walk Estates (CWE) property, which were marital properties. In relevant part, the prior order ordered that defendant shall pay to plaintiff within 30 days the sum of $238,670 for equitable distribution pertaining to the Lindley property; ordered that plaintiff owed defendant $27,044 for a prior debt, which defendant could deduct from the sum she owed to plaintiff; ordered defendant to prepare and sign deeds reconveying a one-half interest in the remaining Lindley property and the CWE property within 60 days; and ordered defendant to provide to plaintiff an accurate accounting of income and expenses pertaining to the CWE property within 90 days, and thereafter, depending on whether there was a net profit or loss shown, plaintiff or defendant shall pay to the other the sum equal to one-half the net profit or loss. Based on the prior order, plaintiff obtained a judgment against defendant that was signed by the Steuben County Clerk in the amount of $211,625.78, which represented the $238,670 equitable distribution award for the Lindley property less the $27,044.22 that plaintiff owed to defendant.

Defendant moved pursuant to CPLR 5015 (a) (3) to vacate the

judgment on the ground of misconduct by plaintiff's attorney in obtaining the judgment in violation of CPLR 5016 (c) by not presenting the judgment to the court. Plaintiff cross-moved, inter alia, for an order denying defendant's motion to vacate or, in the alternative, to request Supreme Court to approve the judgment nunc pro tunc. Defendant then cross-moved for contempt and sanctions against plaintiff. While the motion and cross motions were pending, the court advised counsel for the parties that on the adjourned return date of the motion and cross motions, the court would determine whether defendant should be fined for contempt, apparently referencing defendant's refusal to sign deeds to the properties as directed in the prior order as well as other subsequent orders. In the order now appealed from, the court denied defendant's motion to vacate the judgment and denied as academic plaintiff's cross motion insofar as it sought alternative relief. The court held that the prior order contained an unequivocal mandate to pay the amount demanded within 30 days, and thus the judgment was appropriately entered thereon, and defendant raised no legitimate ground to vacate it under CPLR 5015. The court also denied defendant's cross motion for contempt and sanctions inasmuch as defendant showed no grounds to merit that relief. The court then found that defendant's failure to sign the deeds for the subject properties was a willful violation of the orders and imposed a fine of $535,000, representing one-half the value of the properties.

Defendant contends that the finding of contempt should be vacated. "To prevail on a motion to hold a party in civil contempt pursuant to Judiciary Law § 753 (A) (3), the movant must establish by clear and convincing evidence (1) that a lawful order of the court was in effect, clearly expressing an unequivocal mandate, (2) the appearance, with reasonable certainty, that the order was disobeyed, (3) that the party to be held in contempt had knowledge of the court's order, and (4) prejudice to the right of a party to the litigation" (*Matter of Mendoza-Pautrat v Razdan*, 160 AD3d 963, 964 [2d Dept 2018]; *see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; *Matter of Mauro v Costello*, 162 AD3d 1475, 1475-1476 [4th Dept 2018]). Where the order upon which the finding of contempt was based is subsequently modified or reversed, that does not necessarily mean that the order of contempt must be reversed. A party is still required to obey an order of the court even if the order is erroneously made (*see Gottlieb v Gottlieb*, 137 AD3d 614, 618 [1st Dept 2016]). Where, however, the court did not have jurisdiction, or the order is void on its face, then the order cannot form the basis for a finding of contempt (*see id.*; *Matter of Bickwid v Deutsch*, 229 AD2d 533, 534-535 [2d Dept 1996], *lv denied* 89 NY2d 802 [1996]; *see also People v Loverde*, 151 AD3d 1738, 1738-1739 [4th Dept 2017]).

Here, after the entry of the order on appeal, this Court modified the prior order upon an appeal by defendant (*Jolley v Lando*, 187 AD3d 1530 [4th Dept 2020]). Defendant had transferred title to the Lindley property to her children while reserving a life interest for herself, and she transferred title to the CWE property to an LLC of which she was the sole owner, but later gifted that LLC to her children (*id.* at 1532). We stated in our decision that Supreme Court (Latham, A.J.)

equitably distributed the Lindley and CWE properties "by directing defendant to prepare and execute deeds listing plaintiff as a one-half owner of those properties" (*id.*). We held that "[t]he court, however, lacked jurisdiction to do so inasmuch as the children and the LLC were not named as parties to this action" (*id.*). We therefore conclude in this appeal that the directive in the prior order requiring defendant to sign those deeds cannot be a basis for a finding of contempt, and we therefore modify the order by vacating the finding of contempt and the imposition of a fine upon that contempt.

Defendant next contends that the court erred in denying her motion to vacate the judgment because plaintiff's counsel obtained the judgment in contravention of CPLR 5016 (c). We reject that contention. CPLR 5016 (c) provides that a "[j]udgment upon the decision of a court or a referee to determine shall be entered by the clerk as directed therein. When relief other than for money or costs only is granted, the court or referee shall, on motion, determine the form of the judgment." Where a matter "involves an uncomplicated disposition or simple judgment for a sum of money which speaks for itself," the judgment may be entered by the clerk without prior submission to the court (*Funk v Barry*, 89 NY2d 364, 367 [1996]).

Here, the prior order did not direct any party to settle or submit a judgment to the court, thus indicating that a judgment could be entered by the clerk without prior submission to the court (*see Matter of Barone v Dufficy*, 186 AD3d 1358, 1360 [2d Dept 2020]). In addition, the second ordering paragraph of the prior order provided that defendant "shall pay to [p]laintiff the sum of $238,670 for equitable distribution pertaining to the Lindley, New York property; said money to be paid within 30 days." That is a simple directive for payment of a sum of money which speaks for itself, and thus a judgment on that amount may be entered by the clerk. As plaintiff correctly recognizes, however, based on various errors made by the court in its calculations, we modified the prior order by striking the sum of $238,670 and substituting therefor the sum of $104,350 (*Jolley*, 187 AD3d at 1532), and thus the judgment will now need to be modified to reflect that determination.

We have considered defendant's remaining contention and conclude that it is without merit.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 19-01582

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, ASSERTING CLAIMS IN ITS OWN RIGHT, AND AS THE ASSIGNEE AND REAL PARTY IN INTEREST OF THE CLAIMS OF DIPIZIO CONSTRUCTION COMPANY, INC., PLAINTIFF-PETITIONER-APPELLANT,

V ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION, DEFENDANT–RESPONDENT-RESPONDENT.

CHIESA SHAHINIAN & GIANTOMASI PC, NEW YORK CITY (ADAM P. FRIEDMAN OF COUNSEL), FOR PLAINTIFF-PETITIONER-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (WILLIAM J. BRENNAN OF COUNSEL), FOR DEFENDANT-RESPONDENT-RESPONDENT.

COUCH WHITE, LLP, ALBANY (JOEL M. HOWARD, III, OF COUNSEL), FOR ASSOCIATED GENERAL CONTRACTORS OF NYS, LLC, THE BUILDING CONTRACTORS ASSOCIATION OF WESTCHESTER & THE MID-HUDSON REGION, INC., THE CONSTRUCTION INDUSTRY COUNCIL OF WESTCHESTER & HUDSON VALLEY, INC., BUILDING INDUSTRY EMPLOYEES OF NEW YORK STATE, SYRACUSE BUILDERS EXCHANGE, INC., BUILDERS EXCHANGE OF ROCHESTER, EASTERN CONTRACTOR’S ASSOCIATION, INC., AND NORTHEASTER SUBCONTRACTORS ASSOCIATION, AMICI CURIAE.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered August 16, 2019. The order granted plaintiff-petitioner’s motion for leave to reargue, and upon reargument, adhered to a prior order granting defendant-respondent’s motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

110

CAF 20-00524

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND DEJOSEPH, JJ.

IN THE MATTER OF TAMARA J. WERNER,
PETITIONER-APPELLANT,

V ORDER

KRAIG H. KENNEY, RESPONDENT-RESPONDENT.

KAMAN BERLOVE MARAFIOTI JACOBSTEIN & GOLDMAN, LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PETITIONER-APPELLANT.

JOAN de R. O'BYRNE, ROCHESTER, MICHAEL STEINBERG, FOR RESPONDENT-RESPONDENT.

PAUL B. WATKINS, FAIRPORT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered December 17, 2019 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the petition seeking, inter alia, modification of a prior custody order.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

116

KA 19-02205

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY BURGESS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered November 7, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant, who relocated to New York State having been previously convicted of a sex offense in Florida, appeals from an order determining that he is a level two risk. Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level on the ground that he had been at liberty for a prolonged period without any reoffending conduct (*see People v Iverson*, 90 AD3d 1561, 1562 [4th Dept 2011], *lv denied* 18 NY3d 811 [2012]; *see generally People v Johnson*, 11 NY3d 416, 421-422 [2008]). In any event, defendant's contention lacks merit. Even assuming, arguendo, that defendant's allegation constitutes a mitigating circumstance that is, "as a matter of law, of a kind or to a degree not adequately taken into account by the guidelines" (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see People v Sotomayer*, 143 AD3d 686, 687 [2d Dept 2016]), we conclude that defendant failed to establish by a preponderance of the evidence the existence of that mitigating circumstance in this case (*see People v Yglesias*, 180 AD3d 821, 823 [2d Dept 2020], *lv denied* 35 NY3d 910 [2020]; *People v Sprinkler*, 162 AD3d 802, 803 [2d Dept 2018], *lv denied* 32 NY3d 907 [2018]; *cf. People v Abdullah*, 31 AD3d 515, 516 [2d Dept 2006]). Moreover, even if defendant surmounted the first two steps of the analysis (*see generally Gillotti*, 23 NY3d at 861), upon weighing the mitigating circumstance against the aggravating circumstances—most

prominently defendant's " 'overall criminal history' " (*People v Duryee*, 130 AD3d 1487, 1488 [4th Dept 2015]), including his conviction for failing to comply with the sex offender law in Florida (*see People v Perez*, 158 AD3d 1070, 1071 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018])—we conclude that the totality of the circumstances does not warrant a downward departure inasmuch as defendant's presumptive risk level does not represent an over-assessment of his dangerousness and risk of sexual recidivism (*see People v Sincerbeaux*, 27 NY3d 683, 690-691 [2016]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

117

KA 20-00255

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER FREEMAN, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered January 17, 2020. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We reject defendant's contention that County Court erred in granting the People's request for an upward departure to a level three risk. "[W]hen the People establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]), the existence of aggravating factors that are, 'as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines,' a court 'must exercise its discretion by weighing the aggravating and [any] mitigating factors to determine whether the totality of the circumstances warrants a departure' from a sex offender's presumptive risk level" (*People v Havlen*, 167 AD3d 1579, 1579 [4th Dept 2018], quoting *People v Gillotti*, 23 NY3d 841, 861 [2014]). Here, we conclude that the determination to grant an upward departure was based on clear and convincing evidence of certain aggravating factors, namely the quantity and sadomasochistic nature of the child pornography used by defendant (*see People v Hackrott*, 170 AD3d 1646, 1647 [4th Dept 2019], *lv denied* 33 NY3d 908 [2019]; *People v Tatner*, 149 AD3d 1595, 1595-1596 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]), defendant's admitted fantasies involving children (*see generally People v Millar*, 45 AD3d 1329, 1330 [4th Dept 2007], *lv denied* 10 NY3d 701 [2008]), and the extremely young age of the children depicted in the pornography (*see People v McCabe*, 142 AD3d

1379, 1380-1381 [4th Dept 2016]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

118

KA 20-00050

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TYRONE FLOURNOY, DEFENDANT-APPELLANT.

NICHOLAS B. ROBINSON, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered December 3, 2019. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

119

KA 18-00942

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARKESE SMALLS, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (James W. McCarthy, J.), rendered March 13, 2017. The judgment convicted defendant upon a jury verdict of reckless assault of a child and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of reckless assault of a child (Penal Law § 120.02) and endangering the welfare of a child (§ 260.10 [1]). The case arose from a physical assault upon defendant's three-month-old baby, which resulted in severe, permanent brain injuries to the baby. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that County Court (Anthony F. Aloi, J.) erred in refusing to suppress his video-recorded statements to the police. There is nothing in the record suggesting that the police employed tactics "so fundamentally unfair as to deny due process" or that "could induce a false confession" (*People v Bradberry*, 131 AD3d 800, 802 [4th Dept 2015], *lv denied* 26 NY3d 1086 [2015] [internal quotation marks omitted]; *see generally People v Tarsia*, 50 NY2d 1, 11 [1980]). We reject defendant's further contention that Supreme Court (James W. McCarthy, J.) violated the rule of completeness by permitting the People to play only excerpts of the video recording during their case in chief. "The rule of completeness provides that a defendant is entitled to have the entirety of an admission, statement or recorded conversation, including both inculpatory and exculpatory portions, admitted into evidence, in order to prevent the distortion that may result from

admitting part of a statement out of context" (*People v Horton*, 181 AD3d 986, 993 [3d Dept 2020], *lv denied* 35 NY3d 1045 [2020]; *see People v Dlugash*, 41 NY2d 725, 736 [1977]; *People v Gallo*, 12 NY2d 12, 15 [1962]). Here, the rule was not violated because the entire statement was admitted into evidence. Thus, "defendant could have readily played any portion of the recordings for the jury on cross-examination or during his case-in-chief" (*People v Brinkley*, 174 AD3d 1159, 1165 n 1 [3d Dept 2019], *lv denied* 34 NY3d 979 [2019]).

Further, we reject defendant's contention that the court erred in summarily denying his motion to set aside the verdict pursuant to CPL 330.30 (3). To prevail on that motion, defendant was required to prove that " 'there is newly discovered evidence: (1) which will probably change the result if a new trial is granted; (2) which was discovered since the trial; (3) which could not have been discovered prior to trial; (4) which is material; (5) which is not cumulative; and, (6) which does not merely impeach or contradict the record evidence' " (*People v Madison*, 106 AD3d 1490, 1492 [4th Dept 2013]; *see People v Salemi*, 309 NY 208, 215-216 [1955], *cert denied* 350 US 950 [1956]). Defendant's motion was based entirely on affidavits from his brother and sister-in-law, both of whom averred that, in the afternoon of February 22, 2016, they visited defendant's home. We note that the baby was allegedly assaulted on February 21 and was taken to the hospital in the evening of February 22. The affiants stated that, when they arrived at the home, defendant was at work, but the baby was home with the baby's mother (i.e., defendant's spouse) and the baby's maternal grandmother. There was something wrong with the baby, who lay silent and motionless, and the grandmother stated that she had been telling the mother "for days" to take the baby to the hospital. Defendant failed to show that the allegedly new evidence could not have been discovered earlier in the exercise of reasonable diligence (*see People v Robertson*, 302 AD2d 956, 958 [4th Dept 2003], *lv denied* 100 NY2d 542 [2003]; *cf. Madison*, 106 AD3d at 1493-1494), particularly given the affiants' close familial relationship with defendant. Moreover, the statements attributed to the grandmother were "inadmissible hearsay and thus did not 'create a probability that . . . the verdict would have been more favorable to the defendant' " (*Robertson*, 302 AD2d at 958, quoting CPL 330.30 [3]).

Finally, the sentence is not unduly harsh or severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

122

KA 16-02346

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHAD BURDEN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BENJAMIN L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 6, 2016. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). As an initial matter, we agree with defendant that he did not validly waive his right to appeal because Supreme Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of that waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Crogan*, 181 AD3d 1212, 1212-1213 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]).

Defendant contends that the court should have suppressed statements and tangible evidence because one of the officers who approached the vehicle in which defendant was seated effected an unlawful seizure before he or any other officer detected the odor of marihuana emanating from the vehicle. Defendant's contention is not preserved for our review inasmuch as he failed to raise that specific contention in his motion papers, at the suppression hearing, or in his posthearing papers as a ground for suppression (*see People v Watkins*, 151 AD3d 1913, 1913 [4th Dept 2017], *lv denied* 30 NY3d 984 [2017]; *see generally People v Hudson*, 158 AD3d 1087, 1087 [4th Dept 2018], *lv denied* 31 NY3d 1117 [2018]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of

justice (*see* CPL 470.15 [3] [c]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

126

CAF 19-02163

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF ROSEMAREE DAMICO,
PETITIONER-RESPONDENT,

V ORDER

WALTER SLUSSER, RESPONDENT-APPELLANT,
AND JULIA E. SMITH, RESPONDENT-RESPONDENT.

NICHOLAS B. ROBINSON, PUBLIC DEFENDER, LOCKPORT (THERESA L. PRESIOSO OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Niagara County (Erin P. DeLabio, J.), entered September 12, 2019 in a proceeding pursuant to Family Court Act article 6. The order awarded sole custody of the subject child to respondent Julia E. Smith.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

137

KA 20-00154

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES C. HUNTLEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered September 6, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order determining, inter alia, that he is a level two sex offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We agree with defendant, and the People correctly concede, that defendant's purported waiver of the right to counsel is invalid. "It is well settled that defendants have a statutory right to counsel in SORA proceedings" (*People v Wilson*, 103 AD3d 1178, 1179 [4th Dept 2013]; *see People v David M.*, 95 NY2d 130, 138 [2000]; *People v Middlemiss*, 125 AD3d 1065, 1066-1067 [3d Dept 2015]). In order for a defendant to validly waive his right to counsel, "the court must undertake a 'searching inquiry . . . aimed at [e]nsuring that the defendant [is] aware of the dangers and disadvantages of proceeding without counsel' " (*Middlemiss*, 125 AD3d at 1067, quoting *People v Providence*, 2 NY3d 579, 582 [2004]; *see People v Griffin*, 148 AD3d 735, 735-736 [2d Dept 2017]; *Wilson*, 103 AD3d at 1179). Such an inquiry ensures that the defendant's waiver is " 'made competently, intelligently and voluntarily' " (*Middlemiss*, 125 AD3d at 1067, quoting *People v McIntyre*, 36 NY2d 10, 17 [1974]).

Here, County Court failed to conduct the necessary searching inquiry and, instead, relied upon defendant's notation on the form notice he received about his SORA classification proceeding that he did "not wish to have counsel appointed." The court's failure renders defendant's alleged waiver of the right to counsel invalid and

requires reversal (*see Wilson*, 103 AD3d at 1180). We therefore reverse the order and remit the matter to County Court for a new SORA proceeding to be conducted in accordance with defendant's right to counsel.

Although academic in light of our determination, we note that we further agree with defendant that the form notice provided to him about his SORA classification contained numerous deficiencies. The notice did not fully describe the SORA hearing or the consequences that would follow if defendant failed to appear (*see* Correction Law § 168-n [3]). It also appears that the court failed to provide defendant with a "copy of the recommendation received from the [Board of Examiners of Sex Offenders] and any statement of the reasons for the recommendation" (*id.*). In providing the requisite notice to defendants pursuant to section 168-n (3), courts should be tracking the language used in that statute instead of giving a shortened summary.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

140

KA 18-01133

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL R. HOFFMAN, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered January 26, 2018. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

144

KA 19-02154

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GRACE PIETROCARLO, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered July 16, 2019. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting her, after a nonjury trial, of assault in the second degree as an accessory (Penal Law §§ 20.00, 120.05 [12]). We affirm.

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's contention that the evidence is legally insufficient to support her conviction as an accessory. As relevant here, a person is guilty of assault in the second degree when, "[w]ith intent to cause physical injury to a person who is sixty-five years of age or older, he or she causes such injury to such person, and the actor is more than ten years younger than" the victim (Penal Law § 120.05 [12]). To establish defendant's guilt as an accessory under Penal Law § 20.00, the People were required to prove that defendant had "a shared intent, or community of purpose with the principal [actor] . . . , and that [s]he intentionally aided the principal in bringing forth [the] result" (*People v Nelson*, 178 AD3d 1395, 1396 [4th Dept 2019], *lv denied* 35 NY3d 972 [2020] [internal quotation marks omitted]; *see People v Allah*, 71 NY2d 830, 832 [1988]; *People v McDonald*, 172 AD3d 1900, 1901 [4th Dept 2019]).

Contrary to defendant's argument, this is not a case where she was convicted based solely on her presence at the scene of the crime (*cf. People v Tucker*, 72 NY2d 849, 850 [1988]; *see generally Matter of*

Tatiana N., 73 AD3d 186, 190-191 [1st Dept 2010]). In our view, the victim's testimony at trial was legally sufficient to establish that defendant acted in concert with three other members of her family (codefendants) to cause physical injury to the victim. It is immaterial that the victim could not conclusively state whether defendant actually kicked him during the attack or whether she caused him injury (*see People v Hill*, 251 AD2d 129, 129 [1st Dept 1998], *lv denied* 92 NY2d 899 [1998]) because the victim's testimony that he was surrounded by defendant and the codefendants and kicked on all sides following a confrontation about money allows for the reasonable inference that they collectively delivered the blows that caused the victim's injuries and that they shared the common purpose of injuring him (*see People v Staples*, 19 AD3d 1096, 1097 [4th Dept 2005], *lv denied* 5 NY3d 810 [2005]; *People v Rosario*, 199 AD2d 92, 93 [1st Dept 1993], *lv denied* 82 NY2d 930 [1994]).

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

151

CA 20-00440

PRESENT: CENTRA, J.P., LINDLEY, CURRAN, BANNISTER, AND DEJOSEPH, JJ.

HOHL INDUSTRIAL SERVICES, INC.,
PLAINTIFF-APPELLANT,

V ORDER

WILLIAM F. WEBER, DEFENDANT-RESPONDENT.

COLLIGAN LAW LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (RICHARD A. GRIMM, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 26, 2020. The order, among other things, denied plaintiff's application for a preliminary injunction.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

158

KA 17-01804

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

BRYAN BAILEY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered September 28, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

160

KA 19-02206

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

YUSEF ALHAKK, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), entered October 21, 2019. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

178

CA 20-00655

PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF ANDREW W. DEWOLF,
PETITIONER-APPELLANT,

V ORDER

JAMIE SYRETT, WAYNE COUNTY ALS MEDICAL DIRECTOR,
JAMES LEE, WAYNE COUNTY ALS DIRECTOR, AND WAYNE
COUNTY, RESPONDENTS-RESPONDENTS.

ANDREW W. DEWOLF, PETITIONER-APPELLANT PRO SE.

HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Wayne County (Richard M. Healy, A.J.), entered March 24, 2020 in a CPLR article 78 proceeding. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Entered: February 5, 2021

Mark W. Bennett
Clerk of the Court